TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 238.

WILLIAM F. D. TAYLOR, PETITIONER,

against

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED FEBRUARY 18, 1908.
CERTIORARI AND RETURN FILED MARCH 9, 1908.

(20,681.)

(20,581.)

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INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from the circuit court of the United States for the southern district of New York	1	1
Writ of error	1	1
Clerk's certificate	2	2
Petition for writ of error	3	2
Order for writ of error	5	3
Indictment	7	4
Bill of exceptions	9	5
Evidence for the Government	9	5
Testimony of Hugh Govern, Jr.	9	5
Robert A. Doremus	14	8
Elias Ramadonawich	14	8
Vernon H. Brown	18	11
Government rests	22	13
Motion to dismiss (denied)	22	13
Evidence for defendant	23	14
Testimony of Frederick Passow	23	14
Wm. F. D. Taylor	25	16
G. Stenger	34	22
Defendant rests	35	22

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 25, 1907.

	Original.	Print.
Evidence for the Government	35	22
Testimony of Wm. F. D. Taylor (recalled)	35	22
Motion for acquittal (denied)	36	23
Charge of the court	37	23
Requests as to charge and exceptions	42	27
Motion to set aside verdict, &c.	46	29
Prayer for settlement of bill of exceptions	48	30
Consent to settlement of bill of exceptions	48	30
Judge's certificate to bill of exceptions	48	30
Recognizance on appeal	49	31
Assignment of errors	52	32
Bond	64	39
Citation	69	42
Opinion by Lacombe, J.	70	43
Dissenting opinion of Wallace, J.	79	49
Judgment	86	53
Clerk's certificate	88	53
Writ of certiorari	89	54
Stipulation as to return to writ of certiorari	92	54
Return to writ of certiorari	93	55

a United States Circuit Court of Appeals for the Second Circuit.

WILLIAM F. D. TAYLOR, Plaintiff in Error (Defendant Below),
vs.
THE UNITED STATES, Defendant in Error (Plaintiff Below).

Transcript of Record.

Error to the Circuit Court of the United States for the Southern District of New York.

Printed under the Direction of the Clerk.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Circuit Court, before you, or some of you, between the United States of America, plaintiff, and William F. D. Taylor, defendant, a manifest error hath happened, to the great damage of the said William F. D. Taylor, as is said and appears by his complaint. We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 1st day of August, 1906, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit, may cause further to be done therein, to correct that
2 error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 2d day of July, in the year of our Lord one thousand nine hundred and six and of the Independence of the United States the one hundred and thirtieth.

[SEAL.]

Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is allowed.

E. H. LACOMBE,
U. S. Circuit Judge.

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

I, John A. Shields, Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the following pages, numbered from three to eighty-four, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of William F. D. Taylor, plaintiff in error, against the United States of America, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 6th day of August, in the year of our Lord one thousand nine hundred and six and of the Independence of the United States the one hundred and thirty-first.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

3 (Endorsed:) The United States Circuit Court of Appeals for the Second Circuit.—William F. D. Taylor, Plaintiff in Error, *vs.* The United States of America, Defendant in Error.—Writ of Error.—Lord, Day & Lord, Attorneys for Plaintiff in Error.—A copy of the within paper has been this day received at this office, July 9, 1906. Henry L. Dennison, U. S. Attorney, Attorney for Defendant in Error.—U. S. Circuit Court, Southern District, New York.—Filed July 9, 1906.—John A. Shields, Clerk.

Circuit Court of the United States, Southern District of New York.

THE UNITED STATES OF AMERICA, Plaintiff,
against
WILLIAM F. D. TAYLOR, Defendant.

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Judicial Circuit:

Comes now the above named defendant, William F. D. Taylor, by Lord, Day & Lord, his attorneys, and complains that in the record and proceedings had in said cause in the Circuit Court of the United States in and for the Southern District of New York, in the trial of said cause in the Circuit Court of the United States herein for the Southern District of New York, in the verdict of the jury therein on May 21, 1906, in the denial of the defendant's motion
4 for a new trial and arrest of judgment and the rendition of judgment in the above entitled cause in said United States Circuit Court, Southern District of New York, at the May Term thereof, A. D. 1906, against said defendant, on the 21st day of May, 1906, manifest error hath happened to the great damage of the defendant;

Wherefore, the said defendant prays for the allowance of a writ of error, and for such other orders and process as may cause all and

singular the record and proceedings in said cause to be sent to the said Circuit Court of Appeals, so that the same may be inspected, the Judges of the said Court may cause further to be done therein, to correct that error, what of right and according to law ought to be done.

And your petitioner will ever pray.

Dated New York, July 2, 1906.

LORD, DAY & LORD,
Attorneys for Defendant, No. 49 Wall Street, Borough of Manhattan, New York City.

(Endorsed:) Circuit Court of the U. S., Southern District of New York.—The United States of America, Plaintiff, against William F. D. Taylor, Defendant.—Petition for Writ of Error.—Lord, Day & Lord, Attorneys for Defendant, 49 Wall St., New York.—A copy of the within paper has been this day received at this office, Jul- 9, 1906. Henry L. Stimson, U. S. Attorney.—U. S. Circuit Court, Southern District New York.—Filed Jul- 9, 1906.—John A. Shields, Clerk.

5 At a Stated Term of the Circuit Court of the United States of America, in and for the Southern District of New York, held at the United States Court and Post Office Building, in the Borough of Manhattan, in the City of New York, on the 2d day of July, 1906.

Present: Hon. E. Henry Lacombe, Circuit Judge.

THE UNITED STATES OF AMERICA, Plaintiff,
against
WILLIAM F. D. TAYLOR, Defendant.

On reading and filing the foregoing petition for a writ of error, and assignment of errors, and it appearing that a stay of proceedings has been granted by the Court of sixty days from the 21st day of May, 1905, in which to make and serve a case and exceptions granted to the defendant, and that he has entered into a recognizance in the sum of five hundred dollars, with sufficient sureties, for his appearance at the opening of the United States Circuit Court of Appeals on the third Tuesday of October, 1906, which recognizance is to continue in force until the remittitur or mandate has been ordered and handed down,

Now, on motion of Lord, Day & Lord, attorneys for the defendant, it is

Ordered, that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for
6 the Second Circuit, the record and proceedings heretofore had herein, and the judgment entered herein on the 21st day of May, 1906, and it is further

Ordered, that said defendant file a bond, as provided by statute, and the amount of bond on said writ of error be, and the same is

hereby fixed at the sum of two hundred and fifty ($250) dollars, to be approved as is the practice of this Court.

Enter.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) Circuit Court of U. S., Southern District of N. Y.—The United States of America, Plaintiff, against William F. D. Taylor, Defendant.—Order for Writ of Error.—Lord, Day & Lord, Attorneys for Defendant, 49 Wall St., New York.—A copy of the within paper has been this day received at this office, July 9, 1906. Henry L. Stimson, U. S. Attorney.—U. S. Circuit Court, Southern District, New York.—Filed Jul- 9, 1906.—John A. Shields, Clerk.

7 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held in the City of New York, within and for the District and Circuit aforesaid, on the second Wednesday of December, in the year of our Lord one thousand nine hundred and five, and continued by adjournment to and including the tenth day of January, in the year of our Lord one thousand nine hundred and six.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The Jurors of the United States of America, within and for the District and Circuit aforesaid, on their oath, present that William F. D. Taylor, late of the City and County of New York, in the District and Circuit aforesaid, yeoman heretofore, to wit, on the tenth day of October, in the year of our Lord one thousand nine hundred and five, at the Southern District of New York, and within the jurisdiction of this Court, was master of the steamship *Slavonia*, and then and there brought in and upon said vessel, from a foreign country, to the Port and Southern District of New York, one Elias Ramadonowich, an alien; and he, the said William F. D. Taylor, so being, as aforesaid, the master and in charge of the said steamship, without adopting due precautions to prevent the landing from the same of the said alien, as provided by law, then and there did unlawfully and willfully and permit to land in the said District,
8 the said alien, at a place other than that designated by the immigration officers at said Port, that is to say, at the pier of the said steamship, instead of at the Immigration Station at Ellis Island; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such cases made and provided.

HENRY L. BURNETT,
U. S. Attorney.

(Endorsed:) U. S. Circuit Court.—The United States of America *vs.* William F. D. Taylor.—Indictment.—Landing and permitting alien to land. Sec. 18, Immigration Act of 1903, 32 Stat. 1217. Henry L. Burnett, U. S. Attorney.—A True Bill, Henry Mote, Foreman.—U. S. Circuit Court, Southern District New York.—Filed Jan. 9, 1906.—John A. Shields, Clerk.—Jan. 25, 1906. Def't pleads not guilty. Jan. 25, 1906. Ordered def't paroled in custody of Lord, Day & Lord. M'ch 29, 1906. Trial begun. M'ch 30, 1906. Jury disagreed. May 18, 1906. Def't tried and sealed verdict rendered. May 21, 1906. Def't guilty. May 21, 1906. Def't sentenced to pay a fine of $500 and to stand committed at Kings County Penitentiary until fine be paid or he is otherwise discharged according to law.

9 United States Circuit Court, Southern District of New York.

UNITED STATES, Plaintiff,
against
WILLIAM F. D. TAYLOR, Defendant.

Bill of Exceptions.

This was a trial on an indictment under Section 18 of the Immigration Act of March 3, 1903, charging the defendant, the master of the S. S. *Slavonia* for willfully landing and permitting to land an alien at a place other than that designated by the immigration authorities.

The case came regularly on for trial on May 18, 1906, before Hon. Edward B. Thomas, District Judge, presiding, holding said Court pursuant to statute.

Henry L. Stimson, U. S. District Attorney, by Wm. Michael Byrne and William S. Ball, Assistant United States Attorneys, appearing for the Government. Lord, Day & Lord, appearing for defendant; Lucius H. Beers, of Counsel.

The jury is impaneled and sworn.

Mr. Byrne opens the case on behalf of the Government.

HUGH GOVERN, JR., sworn on behalf of the Government, testified as follows:

Direct examination by Mr. BYRNE:

I am employed as law clerk in the office of the Commissioner of Immigration of the City of New York. By reason of my
10 official duties I am acquainted with the steamship *Slavonia*.

Mr. BEERS: It is admitted on the record that Elias Ramadonawich, an alien, arrived at the port of New York for the Southern District of New York, on the steamship *Slavonia*, of which the defendant, Captain William F. D. Taylor, was the master, on October 10, 1905; that said Elias Ramadonawich was a member of the crew of the said steamship *Slavonia;* that the said steamship *Slavonia*

is owned by the Cunard Steamship Company, Limited, a corporation incorporated under the laws of Great Britain.

Direct examination of Mr. GOVERN continued:

Ellis Island is the place designated by the Government for the examination of aliens. Elias Ramadonawich was not sent over there in October, 1905. I first learned of his presence in this country by a letter, dated November 10, 1905, received from the Superintendent of the Flatbush Poorhouse, Flatbush, New York. Elias Ramadonawich was first brought to Ellis Island November 28, 1905, by Immigration Inspector Doremus to our station. He had been sent to serve a warrant of arrest upon Ramadonawich.

The law division is the department of the Immigration Office at Ellis Island which deals with deserting seamen. I am in charge of that and have personal direction of reports of deserting seamen.

Cross-examination by Mr. BEERS:

I am a lawyer and am practically the legal adviser of the legal department at Ellis Island, except in matters of *habeas corpus* proceedings. We have an attorney also in New York City, who looks after those affairs and sometimes comes with us in other matters. I am familiar with the immigration Statute of March 3, 1903.

11 That is the statute under which the Immigration Department is now acting. I am familiar with the practice of the Immigration Department in the enforcement of that act.

Q. Do the immigration officers at the port of New York designate any place at which merchant ships which come from foreign ports, but do not carry passengers, shall land their crews?

A. I think not, sir.

Q. You do not physically examine the crews of such ships, do you?

A. We do not, if they are *bona fide* members of a crew. I would like to add to that, if they are *bona fide* members of a crew, intending to reship, go out on her through her calling, we do not. We have a regulation which has been brought to the attention of all agents and steamship representatives, requiring them to deliver at Ellis Island such members of their crew as desire to be discharged here or remain in the country.

Q. But a seaman who has regularly shipped as a *bona fide* seaman, you do not consider that it is the duty of your department to examine him or to treat him as an alien?

A. Not if he is going back with the ship.

Q. Unless he signified his intention of remaining in this country?

A. Yes, or the officers have reason to believe that he may endeavor to stay in the country.

Q. But unless there is some circumstance which indicates that he is not a *bona fide* seaman, or he intends to live in New York, you do not treat him as an alien immigrant under the present immigration law?

A. No, sir.

Q. Do the immigration officials in administering the immigration act at this port treat alien members of a crew who do work while the ships are in this port as coming under Contract Labor Clause Act, that is, Section 4 of the act.

The COURT: What has that got to do with the case?

Mr. BEERS: I propose to show that the immigration authorities have to deal in this statute with the word "aliens." Now, the
12 word that is used in this section is the word "aliens." The same word is used in many other sections of the statute, and in no case is it applied to aliens, members of a crew.

The COURT: What difference does it make to me here, to give the law to this jury, what somebody else thinks about it?

Mr. BEERS: Only this: In the discovery of the meaning of broad or doubtful language of the statute, the interpretation put on the statute by the executive department charged with the execution of the statute has been constantly received as giving weight to the interpretation.

The COURT: I am not the slightest interested in it. I would not give it a feather's weight.

Mr. BEERS: The Government in this case has taken a single section of this statute, and has indicted the defendant as being willfully criminal under that section. I think I am entitled as a matter of record to what the holding is.

The COURT: You may have an exception.

Q. And I also ask whether you require the names of alien members of a crew to be entered on manifests which are required to be delivered at Ellis Island under the terms of the existing immigration act?

A. We do not, where they are regarded as *bona fide* members of a crew going back with the steamer.

Q. I show you a pamphlet entitled "Annual Report of the Commissioner of Immigration to the Secretary of Commerce and Labor for the Fiscal Year ending June 30, 1905," in the Government Printing Office, Washington," and ask if that is the last annual report; if you can identify that as the last annual report of the head of the Immigration Department?

A. I do; yes.

Mr. BEERS: I read in evidence from that report on page 77 as a declaration, as a ruling on this subject by the head of the Immigration Department?

Mr. BYRNE: I object to it as immaterial.

Objection sustained. Exception by defendant.

13 The COURT: You may show that that ruling of the Immigration Department has been called to the attention of this defendant. You may put it in evidence—I mean, before the act complained of. If you can show that your company or the defendant—that the defendant acted or was influenced by that ruling in its relation to the alien now in question you may put it in evidence.

Mr. BEERS: For the purpose of the record, I would like to read this, and then your Honor may exclude it.

The COURT: You don't mean read it aloud?

Mr. BEERS: No; I mean mark it for identification in the record. I mark for identification on page 77 of the report of the Commissioner-General of Immigration so much of the page as is included between the letters A and B:

"Legislation should be adopted to check violations of the immigration laws by professed seamen, thus taking advantage of their status acquired under one law to escape the operation of another. Such legislation should impose a sufficient penalty upon masters of vessels for signing other than *bona fide* seamen upon their crew lists, thus enabling such pretended seamen to enter this country without the examination made of all other aliens by simply deserting after arrival at our ports. Masters of vessels should be required to notify inspection officers upon arrival and before departure from ports of this country, so that such officers may be able to ascertain whether aliens brought thereon have departed, if inadmissible to the United States. The masters should also be held accountable for any alien seaman brought by them who, he is informed by an immigrant inspector, should be retained on board as an inadmissible alien, as they are for the escape of alien passengers denied a landing."

14 ROBERT A. DOREMUS, sworn on behalf of the Government, testified as follows:

Direct examination by Mr. BYRNE:

I am a United States Immigration Inspector. As one of my duties in November, 1905, I undertook to find Elias Ramadonawich.

Mr. BEERS: It is admitted on the record that the alien Elias Ramadonawich was found and taken to Ellis Island.

The testimony of Elias Ramadonawich given at a previous trial of this action at the March Term of this Court, A. D. 1906, is read in evidence, in pursuance of a stipulation of the parties, said Ramadonawich not being now in the country.

Direct examination by Mr. BYRNE:

I was born in Montenegro, in Europe, on July 15, 1885, and first came to the United States of America on October 9, 1905. I came on the steamer *Slavonia*.

The witness identifies the defendant as the Captain of the *Slavonia* on that trip, and it is admitted on the record that the defendant was the Captain of the ship on that trip.

I was never in the United States before that time. I was third cook in the steerage kitchen on the *Slavonia*. I hired as cook on the steamer from the 20th of September until the 9th of October.

Q. Did you hire only for the trip across the Atlantic to the United States?

A. I hired for the round trip.

By the COURT:

Q. Here and back?

A. Yes, both.

I hired to come to New York and then go back from New York to Europe.

15 I left the ship the first day I got to this port. The ship arrived here early in the morning; about six in the evening I dressed and took a walk. I did not go back to the ship. I was working at my duties, as third cook all the morning on the first day that the *Slavonia* was in port in October, 1905. I finished up my cook's work that day after a quarter to six in the evening. I then went to my room and dressed and went and left the steamer. The day had not ended yet, but it had started to become dark. Downstairs in the hold lights burned day and night, but upon the deck the lights were not lit yet. My room was in the fo'castle of the ship. Others of the ship's crew were bunking with me in that room. There were about fifteen beds. I dressed and left my room with two others. We left the steamer together to take a walk and then we parted; each went his way, and I was left alone. The other two were members of the crew. In getting from my room down below I came from down on the stairway, went to the upper deck and there are again stairs which lead from the steamer, and I went down on those stairways and left the steamer. There was an entirely open gangplank from the steamer landing on to the pier. The defendant did not stop me from going off the pier that night. Nobody kept me back. I went simply from the steamer, because everybody was permitted at that time to take a walk. When I boarded the *Slavonia* in the European port as her third cook, no rules were read to me; I gave them my book because that was not my first cruise, and I signed and that was all. I remember the time when I was approaching the port of New York, a couple of days out in October, 1905; neither this defendant nor any officer on the ship gave me any instructions regarding my right to go on shore in the port of New York.

By the COURT:

Q. Were you ever told that you could not go on shore at the New York port?

A. Yes, sir.

16 Q. Was there any watchman at the gangplank?

A. I did not see any.

By Mr. BYRNE:

On the trip of the *Slavonia* which ended at the port of New York in October, 1905, I boarded the ship at the port of Fiume.

Q. Were you ever examined here in the port of New York on the deck of the *Slavonia* as she came up the waters of the bay or at her pier in New York or at Ellis Island, or at any other place by any immigration official of the United States about your entrance into the United States?

Objected to as immaterial. Objection overruled. Exception.

A. No, never.

By a JUROR:

Q. Was he ever examined physically by any officer here?
A. Nobody in New York.

By Mr. BYRNE:

I first went to Ellis Island November 28, 1905, from the Metropolitan Hospital where I had been 16 days and from which I had been taken by an immigration inspector.

Cross-examination by Mr. BEERS:

I was on an Austrian ship before I shipped on the *Slavonia*. The voyage I made on the *Slavonia* to New York in October, 1905, was not my first voyage, but was my first trip to New York. I regularly signed as a member of the crew of the *Slavonia* at Fiume, and shipped for the return voyage from Fiume to New York, and back from New York to Fiume. I was to be paid three pounds a month. I was not paid off at New York; up to the time when the *Slavonia* reached New York in October, 1905, I was owed for 18 days' service.

17 The COURT: Does that mean when he left the ship?
Mr. BEERS: Yes, sir.

I am sure that after I first went ashore from the *Slavonia,* when she was here in October, I did not return to the ship at all. I signed the ship's articles as a member of the crew in Fiume.

Q. Are you as sure that you did not return to the ship after you left her in October as you are that your pay was to be three pounds a month?

A. The man who hired me told me I will get so much; I will get that much.

When I signed the ship's articles, they were not read over to me, I only signed them. I was present at the muster of the crew of the *Slavonia* on the morning before I sailed from Fiume. I was not present at any muster of the crew on the *Slavonia* in the port of New York. I had signed ship articles before, I understood that I was becoming a member of the crew of the *Slavonia,* and I understood that I was contracting with the company to come to New York as a member of the crew and to return to Fiume.

Q. All the members of the crew are physically examined by a physician in Fiume, are they not?

A. Only the eyes.

I mean the Doctor turns back the eyelids to examine them. The Doctor so examined me at Fiume.

On being re-called direct by Mr. BYRNE:

I was not present on deck and did not answer to the crew's muster call on October 17, 1905, the day the ship sailed. I left the ship by walking down the gang plank.

Recross examination by Mr. BEERS:

I did not tell anybody that I did not intend to come back to the ship, when I left. I finished my work for the day before I
18 left the ship. I reported to the chief that my work for the day was finished. I did not ask his permission to go ashore.

Q. When did you decide not to go back to the *Slavonia?*

A. On the same day.

Q. After you got ashore?

A. After I got ashore.

Q. Did you meet any friends ashore?

A. Nobody.

Q. But after you got ashore then you made up your mind not to go back to the ship?

A. Yes, sir.

Q. Is that your signature (showing)?

A. Yes, sir; it is my own signature.

Q. This is the signature that you made on the ship's articles in Fiume?

A. Yes, sir.

Mr. BEERS: It appears from the articles which I read in evidence that he is shipped as assistant cook, and his pay to be two pounds a month.

By Mr. BYRNE:

Q. When you left the ship that evening did you intend to go back to the ship?

A. When I left the ship I thought so, but not later.

When I wrote this nobody read to me what was over here in this line; the entries in the other columns, one signed after the other. I did not read what was on this side of the columns for the signature.

The testimony of VERNON H. BROWN, a witness for the Government, taken by deposition, was read in evidence, in pursuance to a stipulation of the parties.

Direct examination by Mr. BYRNE:

I am agent of the Cunard Steamship Company, and have been such for upwards of twenty-five years. There is no officer of the Cunard Steamship Company in the City of New York superior in authority to me. I have been the superior representative of the company in the Port of New York during the whole time of my
19 representation, upwards of twenty-five years. The Cunard Steamship Company is a corporation incorporated in Great Britain. I have been excused from all jury duty for the past ten years on account of certificate from my physician. The steamship *Slavonia* is owned by the Cunard Steamship Company. The *Slavonia* arrived in the Port of New York on the 9th day of October, 1905. She next left the port on October 17, 1905. The present defendant, Capt. William F. D. Taylor, was the master of the *Slavonia*

when she arrived in the Port of New York in October, 1905. The *Slavonia* arrived in this port next before her arrival in this port on October 9, 1905, on August 20, 1905. She remained in port on that trip until August 29, 1905. On that trip on her inward voyage she was commanded by Capt. Charles; on her outward voyage by Capt. Taylor, the present defendant. Capt. Taylor took charge of the ship about twenty-four hours after her arrival at this port. The *Slavonia* reached this port next before the August arrival on July 1, 1905, and sailed July 11, 1905. Her commander on that trip was Capt. Charles.

It is admitted on behalf of the defendant that Elias Ramadonawich, an alien, was a member of the crew of the *Slavonia* and arrived on the *Slovonia* at the Port of New York on October 9, 1905; that Elias Ramadonawich did not leave the Port of New York on the *Slavonia* on October 17, 1905. That neither the witness nor any other officers of the Cunard Steamship Company in New York reported to the Immigration Bureau at Ellis Island that the said Elias Ramadonawich did not leave the United States on the steamship *Slavonia* on October 17, 1905. That no desertions that may have occurred on the trip of October, 1905, were reported by the Cunard Company to Ellis Island.

Q. Were there desertions of members of the crew of the *Slavonia* at this port on her trips previous to the October, 1905, trip?

A. There undoubtedly were, as it is very rarely, if, ever, we have a steamer arrive at this port where one or more members of the crew are not eventually put down as deserters—that is not only the case with all Cunard steamships but with all foreign steamships that come into this port as far as my general knowledge goes.

Cross-examination by Mr. BEERS:

When the steamer *Slavonia* arrived in this port on the 9th of October, 1905, that was the first voyage of the *Slavonia* to this port that Captain Taylor came in command of that ship. I have been in the steamship and shipping business upwards of fifty years.

I was engaged in that business, previous to the time when I became agent of the Cunard Company, at this port and at Boston.

As manager of the ships, always, of course, through a shipping master, I had to do with the chartering of the crews, for steamers and sailing vessels, and have been familiar with that line of business during my entire life. I am familiar with the customs prevailing in the port of New York with respect to the giving of shore leave to the crews of vessels when off duty. The custom varies somewhat in accordance with the employment of the people on board ship—for instance, the engineer's department—firemen, &c., are supposed to put the ship in order preparatory to her sailing day, and the day before sailing they are usually allowed shore leave. In regard to the sailors, why their duty is more continuous, and while some are allowed to go early in the week the others are allowed to go later in the week. I do not know that there is any set rule for allowing sailors to go ashore—they generally go when they get through their work, at

sunset or whatever time it may be and they want to go ashore—they have always been in the habit of doing it.

21 Q. As a matter of your experience, has it always been the custom to allow crews some shore leave when off duty?

A. It has invariably been the custom.

Q. What, in your opinion, and according to your experience, would be the effect of refusing to members of the crews all shore leave?

A. It would result, so to speak, in open rebellion and refusal to work, and furthermore would inspire them with a greater desire to desert than would be the case if they were not subjected to the hardship of confinement.

Q. Mr. Brown, in your experience do seamen frequently desert at the port of New York?

A. I have already testified that almost every ship that comes in there are desertions from.

Q. Are there special conditions existing at the port of New York which induce desertion, and if so what are those conditions?

A. There are all sorts of shore attractions which entice the men away from the ships, and if they get grog ashore they are not always responsible for what they do—furthermore it is very rarely, if ever, that there is an overplus of sailors at this port—in the majority of cases the demand for men is greater than the supply.

Q. In your opinion and experience, Mr. Brown, do the conditions existing at the port of New York make is easy to recover deserters and have them returned to their ships?

A. No; on the contrary, I think it is one of the most difficult places, probably the most difficult port on the Atlantic coast for that purpose for the reason that there are so many devices, dens and places for a sailor to get off on a spree and where he might get concealed, or if he wanted to conceal himself it would be the easiest thing in the world for him to do so.

Q. In your opinion and experience do such desertions at New York indicate that the deserters from the crew become permanant residents in the United States?

A. No, I do not recall any cases where they have really been found to have become permanent residents—as a rule they have only

22 landed temporarily and reshipped the first available opportunity.

Q. From your experience and in your opinion is it possible for a shipowner or shipmaster to prevent all desertions from the crew at New York?

A. It is absolutely impossible.

Q. In your opinion are there any precautions which could be taken by a shipmaster which would prevent all desertions at this port?

A. No possible precautions that I can conceive of.

[The government rests.]

Thereupon counsel for the defendant made the following motion:

I move to dismiss the indictment or for a direction to the jury to acquit the defendant on the following grounds:

1. The evidence shows that the alien in question was a *bona fide* member of the crew of the *Slavonia*, articled to return on the *Slavonia* to the foreign port from which he shipped.

The term "alien" as used in the Act of 1903 and in Section 18 thereof means alien passengers and does not include such a member of the crew.

2. Such a member of the crew is not "brought to the United States" within the meaning of the Act of 1903 and of Sect. 18 thereof.

3. The evidence shows that when the alien went ashore he intended to return to the ship, and fails to show that even after he had determined to desert the *Slavonia* he ever intended to abandon the sea and to remain in the United States.

The act of allowing or not preventing such an alien to go ashore after his day's work under the circumstances shown by the
23 evidence was not a "landing or permitting to land" within the meaning of the Act of 1903 and Sect. 18 thereof.

4. Act of March 3, 1903, and Sect. 18 thereof does not impose any penalty for failing to adopt due precautions.

5. There is no evidence sufficient to go to the jury of any failure on the part of the defendant to adopt due precautions within the meaning of the Act of 1903 and Sect. 18 thereof.

6. There is no evidence sufficient to go to the jury that the adoption of due precautions would have prevented the landing of this particular alien.

7. There is no evidence sufficient to go to the jury of any affirmative action, permission or knowledge on the part of the defendant connected with the landing of the alien in question.

8. The Act of March 3, 1903, and Sect. 18 thereof does not apply to deserting seamen. The desertion of alien seamen is covered by the Act of February 24, 1855, c. 123, and the Treaty with England, 1892, Article 2.

Motion denied. Exception by defendant.

FREDERICK PASSOW, sworn on behalf of the defendant, testifies as follows:

Direct examination by Mr. BEERS:

I am a master mariner and have followed the sea about thirty-seven years; five years in the Royal Navy as a young lieutenant and the rest of the time in the merchant service. I am a citizen of the United States and am now connected with the American Line. I do not know Captain Taylor; I have never seen him at all. I have been coming as master to the Port of New York for about twenty-four years.

24 Q. Are you familiar with the custom prevailing in the Port of New York with respect to giving crews shore leave when off duty?

Mr. BYRNE: That is objected to as immaterial and irrelevant and therefore incompetent.

Mr. BEERS: It is on the grounds of due precautions, your Honor. Objection sustained. Exception by defendant.

Q. In your judgment, captain, would it diminish or increase desertions at this port to refuse shore leave to members of a crew when off duty?

Objected to as incompetent, irrelevant and immaterial. Objection sustained. Exception by defendant.

The COURT: There is no objection to the witness stating, I think, what has been the result of his experience, to tell how they do on the vessels and what his experience is, as to whether they allow people to go ashore, whether people come back and whether they desert.

Q. Will you state your experience, captain, in answer to his Honor's inquiry?

The COURT: Do not give conclusions, but state facts.

A. Of course, the conditions of our ships here are different from European ships.

Q. Why?

A. Simply because this is an American ship, and our crew, especially the ones who would desert, seamen and firemen, are American citizens, and are paid off here. But our steward department who ship with us, they are returned there——

Objected to.

A. (continued). Our steward department, of course, are shipped in England to be returned; make a round voyage and re-
25 turned there, and there are always allowed a sufficient number to take care of the ship. After the night's work is over they are allowed to go on shore. That is the only restriction we make upon them, that we have a certain number on board to take care of the ship. We have always done that, and we found it worked very satisfactorily.

Q. I ask you whether in your judgment it (to refuse shore leave) would tend to increase or diminish desertions?

A. It increases.

The COURT: One moment; I will rule that out.

Exception.

Q. In your opinion, Captain, is it possible by any precautions to prevent all desertions of seamen at the Port of New York?

Objected to. Objection sustained. Exception by defendant.

Cross-examination by Mr. BYRNE:

I am the master of the *St. Paul*, of the American Line. I have met you (Mr. Byrne) before. I pleaded guilty to a violation of this same law in this court. I had on that occasion about five that escaped.

WILLIAM F. D. TAYLOR, the defendant, being duly sworn in his own behalf, testifies as follows:

Direct examination — Mr. BEERS:

I am captain of the *Slavonia* and have been since last August. I left New York August 29th for the Mediterranean, and returned here in October. My October voyage to New York was the first time I came to this port in that ship. I have been in the service of the Cunard Company since 1885. I am 56 years old and have followed the sea 41 years.

Q. On the voyage of the *Slavonia* from Fiume, which ter-
26 minated at New York in October, 1905, please state what, if any, examination was made of members of the crew at Fiume before they were signed on?

Objected to as immaterial.

Mr. BEERS: I am seeking to show what precaution he took to avoid the acceptance of men who had any inducement to avoid the immigration authorities.

A. An examination was made by the doctor of the ship, and also by the Hungarian Immigration doctor, before they were permitted to sign on the out voyage. Any man found physically fit, with no disease of any nature so far as they could ascertain, good character, he was then signed on—not before, and that takes place every voyage in Fiume.

I am always present at these examinations and was present when that examination was made on the *Slavonia* when she left Fiume just previous to her arrival in New York in October, 1905. Exactly the same physical examination was made of members of the crew that is made of alien emigrant passengers who are embarking at Fiume.

All the members of the crew who then signed on at Fiume at that voyage shipped for the round voyage, from Fiume to New York and back to Fiume. They were to be paid off in Fiume. The alien, Elias Ramadonawich, was one of the members of the crew who was then shipped at Fiume for the round voyage to go back to Fiume and to be paid off there.

Q. Please state whether on the voyage from Fiume to New York, terminating in October in the year 1905, you gave any orders or adopted any precautions to prevent the desertion at New York of alien members of the crew, and if you did, state what precautions you took?

A. Every voyage before arriving here——

Q. At this particular voyage?

A. Well, this particular voyage, before arriving here, every mem-
27 ber of the crew was asked if he desired to be paid off in New York, for if so, he would have to pass through Ellis Island, where he would satisfy the Commissioners and then be paid off. If they wished to do so, then their names were taken, and those men were sent down with the passengers to Ellis Island before the Commissioners.

Where members of the crew on that voyage said that they did wish to be paid off in New York, they were sent down to Ellis Island with the passengers and paid off there. The pay of those who did not signify the desire to be paid off in New York was retained here.

Q. Had you any reason whatever to apprehend or suspect that the alien, Elias Ramadonawich, intended to desert at the port of New York?

A. No, I had no idea.

Q. Have you ever in your own experience at this port, Captain, refused or attempted to refuse shore leave to members of the crew while the vessel was in this port?

The COURT: He may state whether he has had to refuse shore leave. Go ahead.

A. I have.

Q. State what you did, Captain, and when?

A. When I had the *Ultonia*, when I was Master of the *Ultonia*, my first trip here, and I refused, absolutely refused leave to any one aboard the ship, and the consequence was that the whole crew refused duty. The engineering department refused to get up steam. The sailors refused to go on board ship. Ship's day came, and had I held out against them, the ship could not have sailed. I consulted Mr. Brown.

Q. In your judgment and in your experience, Captain, would it tend to diminish or increase desertions at this port to refuse all shore leave to members of the crew?

Mr. BYRNE: I object to that as clearly incompetent.

Objection sustained. Exception by defendant.

28 Cross-examination by Mr. BYRNE:

My first voyage to New York on a steamship belonging to the Cunard Steamship Company was in 1882. I have been coming from time to time since then.

Ramadonawich never told me that he intended to remain in the United States. I never told Ramadonawich to go to Ellis Island for examination by the Immigration officials.

Q. If Ramadonawich had said that he intended to remain in the United States would you have voluntarily and without protest released him from his contract to go back with you on the *Slavonia* on her return trip to Fiume in October, 1905?

A. Had he applied to me I should have had no objection.

I would have done the same thing with other members of the crew hired to go back with me if they wished to remain here, provided they went through Ellis Island. Ramadonawich and my crew knew of my willingness to do this. In that case they would have been paid up to the date that they ceased working. All my crew on the October, 1905, trip were hired to make the return trip to Fiume. I have been coming to this port as master of the Cunard Steamship Company's vessels since 1885; since 1882 on the National Line.

Q. Do you not on nearly every trip hire some of a crew for one way to the United States?

A. No.

Q. Do you need as many members of a crew returning?

A. That is not for me to know. I always carry the same number.

Q. Is not your passenger list larger coming to the United States than in returning to Europe?

A. Emigrants, yes.

All my crew on the October, 1905, trip were aliens.

I have not lately looked at my log book for the October, 1905, trip with reference to the entry made therein of seamen who deserted the ship here in New York on that trip. I saw it at the time of the trial in March, 1906.

29 Q. With the recollection of having seen that log book and from your general knowledge, when you left the port of New York, October 17, 1905, were there not then missing from the vessel twenty-three alien seamen whom you had brought over with you on October 9, 1905, and who deserted your ship here while she was in port on that trip?

Mr. Beers: That is objected to as immaterial, and that an answer to it would require the defendant to incriminate himself as to crimes other than the one for which he has been indicted.

Objection overruled. Exception by defendant.

A. Yes.

Q. Was Ramadonawich one of those twenty-three?

A. Yes.

Q. Could Ramadonawich speak English?

A. No.

Q. Did you have printed in his native language and ever have handed him or posted on the ship any rules regulating his shore leave while in the port of New York during October 9, 1905, trip?

A. I had the rules explained to them by a Hungarian steward, who spoke both English and Hungarian.

The rules which I had explained to him in so far as they related to shore leave were that all members of the crew of good behavior would have the usual leave in the evening. We have always given that as long as they behaved themselves. We had no idea that they were going to be deserters. I gave the instructions to the chiefs of each department myself. I could not say personally whether such an instruction reached Ramadonawich. I did not have any rules relating to the regulation of shore leave printed on the ship in the Hungarian language.

I did not on that voyage require the issuance of a ticket of leave, or written permission, or a card of written permission to the seamen desiring to go ashore. I could not say, I am sure, how the guard of the gangplank would know whether the seamen had per-

30 mission to go ashore. He would not know. I had no regulation which would inform my watchman whether any of my crew had permission to go ashore.

I do not keep a book in which is entered the names of the crew who go ashore. I did keep some sort of a record by means of which I could tell how many of my crew were ashore and how many were abroad. The heads of the different departments have the names of those men that went ashore. They always retained a sufficient number on board the ship every night, both the engineering and sailing and steward department. That tallying was not posted in any book kept by the company.

By the COURT:

Q. Who do you mean by that, that the people who went ashore had to get permission, so that the head steward would know whether one of his men had gone ashore?

A. Yes. The Chief Engineer would know whether any of his men had gone ashore.

Q. They had to go?

A. They had to go to these men, of course.

Q. Was that rule in force?

A. That rule was in force; always has been.

By Mr. BYRNE:

Q. Was it always in force?

A. Ever since I have been coming here.

Q. You say in your last testimony that it was not always lived up to; that sometimes they would get a permission one day and would consider that a running permission for the trip?

A. They are not supposed to do that. Of course, I cannot keep my eye personally on each one.

Q. Then, is the rule lived up to?

A. The rule is to ask permission.

Q. But is it enforced?

A. As far as I know; yes.

Q. But isn't it frequently allowed to lapse?

A. Well, I can't say that, I am sure.

31 Q. Yes, but didn't you say it the last time when you were here?

A. Judging from human nature, I dare say it is.

Q. Did you take any precautions to prevent your crew going ashore?

A. Only those that I have mentioned.

Q. The Immigration Act requires you to take due precaution to prevent the landing of an alien contrary to its provisions. Now, what precaution did you take to prevent the landing of Ramadonawich within the meaning of the statute on the October, 1905, trip?

A. I don't know the meaning of the statute.

Q. You have read the statute?

A. Yes; but, I say, I don't know the meaning of it, sir.

The COURT: Don't spend any time on that. What precaution did you take?

Q. Now, what precautions did you take?

A. Simply the precaution that he would have to apply or should have applied to the head of his department for leave to go on shore, the same as any other man would do.

Q. Have you read the section of the Immigration Law requiring due precaution from you in matters of this kind?

A. Section 18?

Q. Section 18?

A. Yes.

Q. Now, take your trips here prior to the October trip, 1905—say, during the year 1905—did you have all aliens for your crew on those trips?

Objected to as immaterial. Objection overruled. Exception by defendant.

A. As far as I know; yes.

Q. Did you have desertions on each of those trips?

A. I have had desertions from time to time; I could not specify them now.

Q. Captain, to the best of your recollection, about what would be the average number of desertions?

Same objection, ruling and exception.

32 A. I could not tell that. I really don't know.

My measures about due precautions to prevent the landing of my crew were the same on the prior trips as I had on the October trip, 1905. I made no change.

Q. Captain, the American law gives you the right to apply to your consul, and on satisfactory proof of the desertions of a seaman your consul can obtain a writ of arrest for that man. Did you take any steps to procure the arrest of Elias Ramadonawich?

A. Elias Ramadonawich?

The COURT: Did you take any steps, Captain, toward his arrest?

A. No, I was sailing at the time.

The COURT: Now give your explanation.

Q. When did you get back to America?

A. Six weeks after.

By the COURT:

Q. Captain, when did these twenty-three men desert, according to your understanding?

A. The first notice I had of it was on the way down out of the harbor.

I actually sailed away from the port and from the harbor before I even knew of a single desertion. The ship's crew mustered that morning at seven o'clock. I sailed at noon. There were none reported to me as being short at the muster. If any were short it would be known to some of my sub-officers, I suppose.

Redirect examination by Mr. BEERS:

It is generally the case that when desertions do occur, they are apt to occur at the last minute, when the deserter cannot be caught.

In giving orders to have the alien members of my crew asked

before the ship arrived at New York whether they wished
33 to be paid off in New York, I gave those orders to remove the temptation to desert. If a very large proportion of the crew had desired to be paid off in New York I would have permitted them to be paid off, provided they went through Ellis Island.

By the COURT:

Q. You do not hold them to their articles?

A. No. We always give them the liberty, if they choose, to pass before the Commissioners. Of course, I could not do away with all their number.

By Mr. BEERS:

Q. But you would allow as many as you could spare, in case they went through Ellis Island, to be paid off there?

A. Yes.

Q. When you have had any reason to suspect that an alien member of your crew was likely to desert, have you allowed him shore leave——

A. I have never had any reason to suspect.

I gave orders requiring members of the crew to have the permission of the heads of their own departments before going ashore, I never gave any order permitting that regulation to be waived. I had no reason to anticipate any negligence or disobedience on the part of the officers to whom I had given that order. I believed them to be trustworthy men.

By the COURT:

Q. Captain, after the muster the morning of the sailing, how could any of the crew get off the ship?

A. Well, we have such a large crowd of people passing off and that it would be very easy for them to get on the wharf.

Q. The last time you told me here that they were on the log?

A. We never knowingly allow them to pass. I put an officer, an engineer and a steward out on the gangway.

34 Q. They are not allowed to pass?

A. They are not allowed to pass.

Q. If they get off they would have to slip by these officers?

A. They would have to do so.

By Mr. BYRNE:

Q. Could twenty-three slip by the officers on the gangplank?

A. Well, it can be done if they dress themselves in shore clothes.

Q. Captain, after the muster at 7 o'clock, how long would elapse before your entire officers would report the result of that matter to you?

A. I am present myself at the muster, personally.

Q. Did you make a report to Ellis Island about the escape of Ramadonawich?

Mr. BEERS: He has testified he did not.

The COURT: He did not know it until he was going down the Bay.

Q. Well, you did not?
A. No.

By Mr. BEERS:

After the muster, on the morning before sailing, the precautions I took to prevent members of the crew from leaving the ship were to post an officer and an engineer and a steward at each gangway leading on the shore, with orders to stop any members of the crew attempting to pass. I put an officer of each department there to recognize his own men, and if a man deserts after the muster, on the morning of sailing, he leaves in disobedience of my orders.

G. STENGER, sworn on behalf of the defendant, testifies as follows:

Direct examination by Mr. BEERS:

I am captain of the steamship *Noordam* of the Holland-American line. I have not the pleasure of knowing Captain Taylor.
35 I have followed the sea for about thirty-four years and have been a master nineteen years. I have been coming to this port about twenty-four years.

It is not, in my judgment and experience, possible to prevent desertions at the port of New York. It is impossible to prevent all desertions at the port of New York by taking any precautions whatever.

Q. What, in your opinion and experience, would be the effect of refusing all shore leave to members of the crew when off duty?

Objected to as incompetent and irrelevant. Objection sustained. Exception by defendant.

Q. Can you, from your experience, think of any precaution which a master could take in this port to prevent all desertions?

Objected to by counsel for the Government.

The COURT: He says it is impossible for it to be done.

A. I don't think anything would stop it. Impossible to stop it all.

[Defendant rests.]

WILLIAM F. D. TAYLOR, recalled:

Examination by Mr. BYRNE:

When I give leave to a seaman the measures I take to secure his return to the ship are that his name will be called on the roll the next morning when we turn to. If he is missing of course he will be marked down. I would take no other compulsory means for his return until he is proclaimed a deserter. He might return in a few hours during that day. He might return in twenty-four hours. You can't very well call him a deserter until he has
36 been absent twenty-four hours. I would not consider it a precaution to secure the return of the visiting seaman to call his name after he had gone. It is to ascertain if he is present.

By the COURT:

Q. After twenty-four hours what do you do?

A. Well, it has never fallen to my lot to, because they have always, if absent, it has always taken place just the day of sailing. They may be absent a few hours during our time here, perhaps away drinking, and they come back again. It is only the last moment, the last day, if a man has made up his mind to desert that he shows himself at the muster and then disappears.

Cross-examination by Mr. BEERS:

If a seaman on shore leave fails to return, but is not reported as absent after the muster the next morning, that would be a neglect of duty on the part of one of my subordinate officers. It is the duty of my subordinate officers to report to me if any man is absent at the morning of the muster. I have never given any orders waiving that rule. On the morning in question I heard the roll call. Upon the roll call each man answered his name.

Q. Answered so you could hear?

A. Yes, sir.

Q. You heard all these names?

A. I heard them all.

Q. And heard them all respond?

A. All respond.

Mr. BEERS: I move for direction of acquittal on the same grounds enumerated in the motion to dismiss the indictment.

The motion was overruled on each ground and exception taken on each ground.

The case was summed up by Mr. Beers for the defendant and Mr. Byrne for the Government.

37 *Charge of the Court.*

THOMAS, *C. J.:*

Gentlemen of the jury: Notwithstanding my own haste, and your undoubted desire to take this matter up and come to a decision, I feel it my duty to go over with some painstaking the statute which is now under consideration and under which this defendant is charged. In determining the innocence or guilt of the defendant you will remember that although this is an offense which does not involve moral turpitude—that is, it is not an offense or crime *per se* like robbery or stealing or counterfeiting, or anything of that kind—yet that it is an offense created by the statute, and therefore the defendant is entitled to that rule to which your attention has so often been called, that he is presumed to be innocent until he shall have been proven guilty beyond a reasonable doubt. I will not stop now to enlarge upon either the terms presumption of innocence or reasonable doubt. I have been over them so often that I have no doubt you have it fully in your mind.

The indictment charges that the defendant, as master of the steamship *Slavonia*, and without adopting due precaution to prevent the

landing from the ship of an alien, as provided by law, then and there did unlawfully and wilfully land and permit to land within the United States the alien at a place other than that designated by the Immigration Officers of the Port. That is, the man was not passed through Ellis Island. The statute provides that it shall be the duty of the owners, officers and agents of any vessel bringing an alien to the United States, to adopt due precaution to prevent the landing of any such alien from such vessel at any time or place other than that designated by the immigration officers, and any such owner, officer, agent or person in charge of such vessel who shall so land or
38 permit to land any alien at any time or place other than that designated by the immigration officers, shall be deemed guilty of a misdeameanor.

Now you see that the statute says that it shall be the duty of the officer to adopt due precaution to prevent landing, and that he is punishable if he lands or permits the alien to land. Now a statute is to be considered reasonably so as to give force and effect to all its provisions, if possible, and words are deemed to be used in their ordinary sense. Now if a captain under this statute should take a man and let him go; say to him: "Go off the ship and sever our relations; you go ashore," he would then land him. If a man said to the captain: "I am going ashore," and the captain knew that he was going ashore, or it was reported to him and he had reason to believe that he was going ashore, and he stood by and did nothing, then he would permit him to land, which would be a connivance and a concert of action between the alien and the captain that would be so apparent that of course the case would not be here. But suppose that he does not know in the particular case that the alien is going to desert the ship and land; that is, to go ashore for the purpose of remaining, or if he does go ashore without that intention and that he changes his mind afterwards and remains, still it is the duty of the captain to use due precaution lest a member of his crew, an alien, does go ashore and fails to return. Now mark my words: "Due precaution," because the word "permit" means to allow an opportunity. Another meaning is to take no steps to prevent. So if the captain of the ship does not use due precaution to shut off opportunity for this desertion and landing; due precaution to prevent the overt act which the alien does, then he would fall under the condemnation of the act.

So you have the situation here. He allows members of his crew to go ashore; he allows them to land, but not with the expecta-
39 tion that they will remain on the land. The act itself is wilful, so far as his going ashore is concerned, because he makes it a rule that any member of the crew may go ashore upon obtaining consent. Then the question comes down to this, looking at it sensibly; assuming that it is right, and just and necessary that he should allow his crew, when in port, to go upon the shore temporarily with the expectation that they will come back to the ship, has he nevertheless been so neglectful that he has not taken due precaution to see to it that men go ashore under such constraint and restrictions that they will come back to the ship.

Now take each case as it comes up. He has men in his crew that

have sailed with him for years. I don't know how that may be; it is an illustration. Men who are perfectly reliable. He knows that when that man goes ashore that he will come back; that if the man goes ashore under the promise to come back he knows that the man will keep his promise and come back. He may have members of the crew of whom he has no knowledge, and of whose purposes and intention and character he has no knowledge. The question is whether under all these circumstances it should be permitted to members of the crew freely to go ashore without taking some precautions that will be due under the circumstances of the case to see that the men come back to the ship. We have to take the case as we find it. We are trying but one case. We are not trying one thousand. We are not trying to settle this question as to whether sailors shall be allowed to go ashore at all; whether they shall be kept on the ship in port; but we are settling the question whether he used due precautions to see to it that when he allowed this man to land he used the precautions for his return. Whether it was prudent for him to let him go ashore under the circumstances that he did.

Now, you have got the situation. The first thing for you to determine is whether a ship captain is using due precaution when he has a general rule that any member of his crew may go ashore upon obtaining permission. Now, there is no evidence here that the man did obtain permission in this case, and the question is, if the rule is that he must obtain permission, go before his superior and make the request, whether that rule was enforced; whether he had proper discipline on the ship, and whether, as applied to this particular man, there should have been something done that was not done to put constraint upon him to see to it that he did not go ashore and to see to it that he returned to the ship if he did go ashore.

Now, what kind of precaution should be used? The captain of this vessel has sole and authoritative command. He is the ruler of the ship. He is supposed to have the necessary capacity to deal with the questions that come to him and the obligations that the law places upon him, and it is his duty to exercise the care that any good business man in that occupation would exercise; take the precautions that such a man would take, a good business man, and see to it that men who are aliens and part of his crew, if allowed to go ashore should be allowed to do so under such rules, discipline and restraint as would tend to bring them back to the ship. Now if the captain has done that he has done his whole duty, and that is the essential thing for you to grasp and say what would a typical business man in that occupation have done under those circumstances.

We now come to the question what did the captain do. Now here is a law that says that aliens shall not be permitted to land and due precautions shall be taken by the officer with reference to the men. Now let us consider it fairly and see whether the captain has taken the due precaution under the circumstances of the case. It appears in evidence that men always desert; frequently have deserted from

his ship coming to this port. He has testified that he has not
41 increased his precautions and that the precautions in former cases are the precautions now. He himself had notice by his own history of what might happen in this voyage. It is not as if this was the first desertion that ever took place on the ship, or as if it was a rare thing, but it was something that was happening somewhat continuously. Men were leaving. Now this is the history behind him and facing him when the ship was here and it was his duty, I say to do what a good business man would do. Now what does he say he did? He said that in the first place he held 18 days of the man's pay. These 18 days' pay was hostage for the man's return. Of course he had to give weight to that, as far as it went, and had a right to rely upon the fact that the man would come back and get his money. Two pounds a month I believe it was for 18 days, and so far that was his security. He had the articles the man had signed to make the round trip. The other precaution he said he took was that he informed the men or caused them to be informed that anybody could leave the ship at this port and land, provided he would go through Ellis Island. Well, to a man who can go through Ellis Island it is no temptation for him to desert if he wants to land and remain in this country. The question is whether giving a man permission to go through Ellis Island and the searching inquiry of a Board of Inquiry there, is such a restraint upon the man that he won't desert the ship. If he knows he must go through that way, the legitimate way, does that keep him from landing without going through? That is for you to say.

Now I have allowed evidence here of what happened. Twenty-three men deserted in this port and did not return to the ship. Now we are trying but one question of the guilt or innocence of the defendant as to this particular man, but the question of the number of men that escaped from the vessel may be considered by you upon the question of whether he was using due precautions to prevent seamen
42 escaping. Of course, if the case presented to you was that but one man escaped the reflection upon the diligence of the captain or his officers, or both, would be quite different than if it was shown that the whole crew went ashore, and though you have a right—I am exaggerating this statement for the purpose of illustrating—when you come to consider the negligence of the captain, or of his using due precautions, if you find that twenty-three men escaped, the next question is, how does that bear upon his guilt or innocence in this case. Something has been said about the impossibility of preventing all desertions. We are not trying that question, but we are trying the question whether in this particular case the statute has been disobeyed. Nor are we to say that an attempt shall not be made to obey it simply because it is the opinion of some people that it cannot be fully obeyed under all the circumstances of the case.

Now, this is an important question, and the captain of this vessel is undoubtedly a gentleman of repute. He is in no sense a criminal in the ordinay sense of the term. Nobody makes that pretense, but he chances to hold just that position which makes him amenable to

the law, and therefore places upon him the responsibility of carrying out this statute. At least he is one of the persons upon whom the responsibility is to be placed, and if you cannot look to the captain of the ship to observe the law, the man in immediate close quarters with the ship and its doings in port, to whom can you look. I only speak of this so that there shall be no feeling with reference to the matter of the fact that he is a man whom as a man we have the right to feel confidence in and undoubtedly do feel lest you should feel that any less responsibility rests confidence in, upon him so far as the statute is concerned.

I will hear the requests to charge.

Mr. BEERS: I except to your Honor's charge that Section 18 of the Immigration Act applies to aliens who are *bona fide* seamen.

43 Also I except to the reference to the desertion of twenty-three men.

I ask you to charge that even if the jury shall find that the defendant did not take due precautions to prevent landing, they must acquit him unless the landing was unlawful.

The COURT: The landing was unlawful if he did not use due precautions with reference to his going ashore.

Mr. BEERS: I do not think the element of due precaution has anything to do with the penalty.

The COURT: I do not want to hold the captain to any rule as you suggest.

Exception taken.

Mr. BEERS: That where a seaman who had previously sailed on another ship signed at a European port after passing a physical examination as a regular member of a crew for the return voyage to New York and back to Europe, and after he had declined an offer to be paid off and landed at Ellis Island, it was not unlawful for the defendant to grant him shore leave when his day's work was done, his pay being held back.

The COURT: I do not say whether it is unlawful for him to do it or not. I say that it was not unlawful for him to allow the man to go ashore if he used the due precautions a good business man would use with reference to the matter by discipline, by instructions, by rules or in any other way that would determine the propriety of his going ashore and the probability of his return.

Exception taken.

Mr. BEERS: That Section 18 of the Immigration Act does not apply to an alien who at the time he came into the United States and left the ship was a *bona fide* member of the crew, bound to return with the ship to a foreign port and who left the ship with the intention of returning to it.

The COURT: If he left the ship with the intention of re-

44 turning, and changed his mind afterwards, that is simply one of those vicissitudes that might happen to any sailor going ashore, and that would simply bear upon the precautions the captain had to take with reference to such a person.

Exception taken.

Mr. BEERS: That Section 18 of the Immigration Act did not re-

quire the defendant to prevent an alien member of the crew from leaving the vessel when off duty if he had no reason to anticipate that such alien intended to desert.

The COURT: I charge that in this way: That the captain of the vessel had a right to let his crew or any member of the crew go ashore, provided he used due precautions in determining the advisability of his going ashore with reference to his return, and took proper precautions to see to it that if he did go ashore he would return to the ship.

Exception taken.

Mr. BEERS: That under the provisions of Section 18 of the Immigration Act, the defendant cannot be convicted unless the jury is satisfied beyond a reasonable doubt that the defendant, by some affirmative act, or wilfull act landed Ramadonawich or permitted him to land, at a place other than that designated by the immigration authorities.

The COURT: Suppose he did not do anything at all. An affirmative act is to do something. Now, suppose he did nothing? I cannot make that charge. It may be an act of neglect from omission as well as by some affirmative action.

Exception taken.

Mr. BEERS: Unless the jury find that his duty to adopt due precautions required the defendant to endeavor to prevent this alien Ramadonawich from going ashore after his day's work was over, they must acquit.

The COURT: No; I refuse to charge in those words. I
45 charge that in determining whether the captain had used due precautions they can take into consideration that he did go ashore at that time, if you assume that to be the fact, after his day's work was over. The mere fact that he went ashore after his days' work was over would simply bear on the question of the time he went. The circumstances under which he went the jury would consider in passing on the care of the captain.

Exception taken.

Mr. BEERS: That if the jury find that the alien Ramadonawich would not have been prevented from going ashore if the defendant had adopted all due precautions, they must acquit.

The COURT: If they find that the man would have gone ashore if the captain had adopted all due precautions—he would have gone ashore just the same—they must acquit. I so charge.

Mr. BEERS: That in considering whether or not the defendant adopted due precautions under the terms of Section 18 the jury may consider whether or not the refusal of shore leave after their day's work is done, to *bona fide* seamen whose records are clear would tend to increase or diminish desertions from the crew.

The COURT: I refuse to charge. It has nothing to do with this at all.

Exception taken.

Mr. BEERS: That if the jury find that Elias Ramadonawich was a *bona fide* member of the crew and that he intended to return to the

ship when he went ashore, permitting such going ashore was not permitting a landing under the terms of Section 18 of the Immigration Act.

The COURT: That I refuse to charge. I have already charged with reference to the matter.

Exception taken.

46 Mr. BEERS: I ask your Honor to charge that if the defendant gave proper orders to the proper officers under him and exercised such a degree of supervision over the execution of his orders as was consistent with his duties as Master, he is not to be held responsible for the neglect or faithlessness of a subordinate officer which contributed to the escape of this deserter unless it is proved that he has reason to anticipate such neglect or faithlessness.

The COURT: If this all happened after he had done his duty as Captain and Master and through the neglect of a subordinate the man escaped, the Captain is not responsible for it. I so charge.

Mr. BEERS: If the jury find that the evidence before them is insufficient for them to determine what would have been the due precautions under Section 18 of the Immigration Act, which it was the duty of the defendant to adopt in regard to this alien, and to determine beyond a reasonable doubt that the defendant failed to adopt such precautions, the jury must acquit the defendant.

The COURT: I refuse so to charge.

Exception taken.

The jury then at 3.25 P. M. retired.

The jury came into court and handed in a sealed verdict of "Guilty."

Mr. BEERS: I move to set aside the verdict and for a new trial and arrest of judgment on the following grounds:

1. Verdict is contrary to the evidence. The evidence did not show the defendant beyond a reasonable doubt to have been guilty of the crime charged in the indictment.

2. Errors in the admission and exclusion of evidence, noted at the time such evidence was received and excluded and exceptions then duly taken, all as shown in the minutes of the trial, require a new trial.

47

3. Errors in the denial of the defendant's motions for a dismissal of the indictment and for a direction of an acquittal on the grounds specified in the minutes of the trial, and the exceptions then duly taken require a new trial.

4. Errors in charge of the Court and in the refusal of the Court to charge as requested and to the amendments to the charge made by the Court, when the requests to charge were refused, and the exceptions then duly taken, all as appears in the minutes of the trial, require a new trial.

Motion denied.

I ask that, without now re-specifying, the grounds stated for the defendant's motions and exceptions during the trial of the action, at the close of the Government's case, at the conclusion of the entire case and on the charge and requests to charge may be spread in full on the record in support of this motion when the case is made up.

Mr. BEERS: I assume your Honor will give me an exception on each ground.

The COURT: Yes.

The defendant was sentenced to a fine of $500 or to be imprisoned until the fine is paid in the Kings County Penitentiary.

Judgment stayed upon the giving of a bond for the payment of the fine, such as the District Attorney's office shall approve.

The defendant is permitted by the Court to go to sea to-morrow on the assurance of counsel that the proper bond will be given.

Sixty days to file assignments of error and bill of exceptions and make a case on appeal, the term being extended three months for the purpose, the stay being granted upon the grounds already stated.

48 And now, in furtherance of justice and that right may be done, the defendant presents the foregoing as the bill of his exceptions in this case, and prays that the same may be settled and allowed and signed and certified by the judge as provided by law.

Dated New York, July 2, 1906.

LORD, DAY & LORD,
Attorney- for Defendant, William F. D. Taylor,
Borough of Manhattan, City of New York.

Notice of settlement waived.
Consented to.

HENRY L. STIMSON,
U. S. Att'y.

Dated July 5, 1906.

Inasmuch as the matters produced and offered in evidence on said trial and the said exceptions so made to the ruling and decisions of said judge do not appear on the record of the said cause in the Circuit Court of the United States for the Southern District of New York, the defendant has prepared and caused to be settled this bill of exceptions, and so much thereof as appears herein as the record thereof, in accordance with the statute in such case made and provided, and the time for filing the same having been duly extended, the Court hereby signs and orders this bill of exceptions to be filed *nunc pro tunc* as of May 21, 1906.

Dated New York, July 7, 1906.

EDWARD B. THOMAS, *U. S. J.*

(Endorsed:) United States Circuit Court, So. District of New York.—United States, Plaintiff, against William F. D. Taylor, Defendant.—Bill of Exceptions.—Lord, Day & Lord, Attorneys for Defendant, 49 Wall St., New York.—A copy of the within

49 paper has been this day received at this office, Jul- 2, 1906. Henry L. Stimson, U. S. Attorney.—U. S. Circuit Court, Southern District, New York.—Filed Jul- 6, 1906.—John A. Shields, Clerk.

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

Be it remembered that on this 21st day of May, in the year of our Lord one thousand nine hundred and six, before me, John A. Shields, one of the Commissioners duly appointed by the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes depending in the courts of the United States, pursuant to the provisions of the Acts of Congress in that behalf, personally came Wm. F. D. Taylor, principal, and Lucius H. Beers, surety, and severally acknowledged themselves to owe to the United States, that is to say, the said Wm. F. D. Taylor, the sum of five hundred dollars, and the said Lucius H. Beers the sum of five hundred dollars, separately to be levied and made of their respective goods and chattels, lands and tenements to the use of the said United States if default shall be made in the condition following, to wit:

Whereas, at the Stated Term of the Circuit Court of the United States for the Southern District of New York, held on the 9th day of January, in the year of our Lord one thousand nine hundred and six, the Grand Inquest of the United States within and for the District aforesaid found a true bill of indictment against the said Wm. F. D. Taylor, the said William F. D. Taylor, being then and there master of the steamship *Slavonia,* with having then and there brought in and upon said vessel from a foreign country to the Port and Southern District of New York one Elias Ramadonowich, an alien; and he, the said William F. D. Taylor, so being, as aforesaid, the master and in charge of the said steamship, without adopting due precautions to prevent the landing from the same of the said alien, as provided by law, then and there did unlawfully and wilfully land and permit to land in the said district the said alien at a place other than that designated by the immigration officers at said Port, that is to say, at the pier of the said steamship instead of at the Immigration Station at Ellis Island; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

And whereas, the said Wm. F. D. Taylor has been brought before the said Circuit Court, to answer the indictment aforesaid;

And whereas, the said Wm. F. D. Taylor has been convicted of the offense as charged in the indictment, and the said William F. D. Taylor having been sentenced by the Court on the 21st day of May, 1906, to pay a fine of five hundred dollars, and the said William F. D. Taylor to stand committed at the Kings County Penitentiary until the fine be paid or he is otherwise discharged according to law; and

Whereas, a stay of proceedings has been granted by the Court of sixty days from the 21st day of May, 1906, within which to make and serve a case and exceptions, granted to the defendant; and

Whereas, the said Circuit Court did on the 21st day of May, 1906, order the said William F. D. Taylor to find sufficient bail in the sum of five hundred dollars for his appearance at the opening of the

United States Circuit Court of Appeals for the Second Circuit, on the 3d Tuesday of October, 1906, at the opening of Court at 10.30 A. M., and to continue in force until the remittitur and mandate has been ordered and handed down, and that in default of finding such bail the said William F. D. Taylor would stand committed.

51 Now, therefore, the conditions of this recognizance are such that if the said William F. D. Taylor shall personally appear as above stated and required, and abide the order of the Court, then this recognizance to be void, otherwise to remain in full force and virtue.

WILLIAM F. D. TAYLOR. [SEAL.]
LUCIUS H. BEERS. [SEAL.]

Acknowledged before me the day and year first above written.
JOHN A. SHIELDS,
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Lucius H. Beers, of Westhampton Beach, Long Island, New York, being duly sworn, deposes and says: That he is worth the sum of one thousand dollars, over and above all his just debts and liabilities.
LUCIUS H. BEERS.

Sworn to this 21st day of May, A. D. 1906, before me.
JOHN A. SHIELDS,
U. S. Commissioner.

(Endorsed:) U. S. Circuit Court.—The United States of America *vs.* Wm. F. D. Taylor.—Recognizance on Appeal, returnable the 3rd Tuesday of Oct. 1906. Henry L. Stimson, U. S. Attorney.—Filed the 21st day of May, 1906.

52 United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA, Plaintiff,
against
WILLIAM F. D. TAYLOR, Defendant.

Now comes the defendant William F. D. Taylor, by Lord, Day & Lord, his attorneys, and with his petition for a writ of error files the following assignment of errors, upon which he will rely in the prosecution of the writ of error in the above entitled cause—

1. That the United States Circuit Court in and for the Southern District of New York erred in refusing to allow the witness Hugh Govern, Jr., to answer the question asked of him by counsel for the defendant and plaintiff in error, which question was as follows:

"Q. Do the immigration officials in administering the immigration act of this port treat alien members of a crew who do work while the ships are in this port as coming under the contract labor clause of the act, that is, Section 4 of the Act?"

2. The said Court erred in excluding from evidence on the objection of the counsel for the Government and defendant in error a certain portion of the Annual Report of the Commissioner of Immigration to the Secretary of Commerce and Labor for the fiscal
53 year ending June 30, 1905, said portion being marked for identification on page 77 of said report as being included between the letters "A" and "B" and being offered in evidence by the counsel for the defendant and plaintiff in error.

3. That said Court erred in overruling the objection of counsel for defendant and plaintiff in error to the following question asked of witness Elias Ramadonovich—

"Q. Were you ever examined here in the Port of New York on the deck of the *Slavonia* as she came up the waters of the bay, or at her pier in New York, or Ellis Island, or any other place by any immigration official of the United States, about your entrance into the United States?"

which question was answered as follows:

"A. No; never."

4. That said Court erred in denying the motion of counsel for the defendant and plaintiff in error at the close of the case on behalf of the Government to dismiss the indictment or to direct the jury to acquit the defendant on the evidence presented by the Government and defendant in error, upon the following grounds:

"1. The evidence shows that the alien in question was a *bona fide* member of the crew of the *Slavonia*, articled to return on the *Slavonia* to the foreign port from which he shipped.

The term 'alien' as used in the Act of 1903 and in Sect. 18 thereof means alien passengers and does not include such a member of the crew.

2. Such a member of the crew is not 'brought to the United States' within the meaning of the Act of 1903 and of Sect. 18 thereof.

3. The evidence shows that when the alien went ashore he intended to return to the ship and fails to show that even after
54 he had determined to desert the *Slavonia* he ever intended to abandon the sea and to remain in the United States.

The act of allowing or not preventing such an alien to go ashore after his day's work under the circumstances shown by the evidence was not a 'landing or permitting to land' within the meaning of the Act of 1903 and Sect. 18 thereof.

4. Act of March 3, 1903, and Sect. 18 thereof does not impose any penalty for failing to adopt due precautions.

5. There is no evidence sufficient to go to the jury of any failure on the part of the defendant to adopt due precautions within the meaning of the Act of 1903 and Sect. 18 thereof.

6. There is no evidence sufficient to go to the jury that the adoption of due precautions would have prevented the landing of this particular alien.

7. There is no evidence sufficient to go to the jury of any affirmative action, permission or knowledge on the part of the defendant connected with the landing of the alien in question.

8. The Act of March 3, 1903, and Sect. 18 thereof does not apply to deserting seamen. The desertion of alien seamen is covered by the Act of Feb. 24, 1855, c. 123, and the Treaty with England, 1892, Article 2."

5. That said Court erred in sustaining the objection of the counsel for the Government and the defendant in error in disallowing the following question asked during the examination of the witness Frederick Passow:

"Q. Are you familiar with the custom prevailing in the port of New York with respect to giving crews shore leave when off duty?"

55 6. That said Court erred in sustaining the objection of the counsel for the Government and the defendant in error in disallowing the following question asked during the examination of the witness Frederick Passow:

"Q. In your judgment, Captain, will it diminish or increase desertions at this port to refuse shore leave to members of the crew when off duty?"

7. That said Court erred in ruling out the answer of the witness Frederick Passow to the question:

"Q. I asked you whether, in your judgment, it (to refuse shore leave to seamen) would increase, would tend to increase or diminish desertions?"

which answer was—

"A. It increases."

8. That said Court erred in sustaining the objection the counsel of the Government for defendant in error, and in disallowing the following question asked during the examination of the witness, Frederick Passow:

"Q. In your opinion, Captain, is it possible by any precautions to prevent all desertions of seamen at the port of New York?"

9. That said Court erred in sustaining the objection the counsel of the Government for defendant in error, and in disallowing the following question asked during the examination of the witness, William F. D. Taylor:

"Q. In your judgment and in your experience, Captain, would it tend to diminish or increase desertions at this port to refuse all shore leave to members of the crew?"

10. That said Court erred in overruling the objection of
56 the counsel for the defendant and plaintiff in error, and compelling the witness to answer the following question asked of the witness, William F. D. Taylor:

"Q. With the recollection of having seen that log book and from your general knowledge, when you left the port of New York, October 17, 1905, were there not then missing from the vessel twenty-three alien seamen whom you had brought over with you on October 9, 1905, and who deserted your ship here while she was in port on that trip?"

which question was answered as follows:

"A. Yes."

11. That said Court erred in overruling the objection of the counsel for the defendant and plaintiff in error, and in compelling the witness to answer the following question asked of the witness, William F. D. Taylor:

"Q. Now, take your trips here prior to the October trip, 1905, say during the year 1905, did you have all aliens for your crew on those trips?"

which question was answered—

"A. As far as I know, yes."

12. That said Court erred in overruling the objection of the counsel for the defendant and plaintiff in error, and compelling the witness to answer the following question asked of the witness William F. D. Taylor:

"Q. Captain, to the best of your recollection about what would be the average number of desertions?"

which question was answered as follow-:

"A. I could not tell that. I really don't know."

57 13. That said Court erred in sustaining the objection of the Government and defendant in error, and in disallowing the question asked of the witness, G. Stenger—

"Q. What, in your opinion and experience, would be the effect of refusing all shore leave to members of the crew when off duty?"

14. That said Court erred in denying the motion of counsel for the defendant and plaintiff in error at the close of the defendant's case to instruct the jury to acquit the defendant upon the grounds set forth in assignment 4 herein.

15. That said Court erred in instructing the jury that Section 18 of the Immigration Act applies to aliens who are *bona fide* seamen, as appears by the following instruction given during the course of the charge to the jury:

"The indictment charges that the defendant, as master of the steamship *Slavonia,* and without adopting due precaution to prevent the landing from the ship of an alien, as provided by law, then and there did unlawfully and willfully land and permit to land within the United States the alien at a place other than that designated by the Immigration Officers of the Port. That is, the man was not passed through Ellis Island. The statute provides that it shall be the duty of the owners, officers and agents of any vessel bringing an alien to the United States, to adopt due precaution to prevent the landing of any such alien from such vessel at any time or place other than that designated by the Immigration officers, and any such owner, officer, agent or person in charge of such vessel who shall so land or permit to land any alien at any time or place other than that designated by the Immigration officers, shall be deemed guilty of a misdemeanor.

Now you see that the statute says that it shall be the duty of the officer to adopt due precaution to prevent landing and that he is punishable if he lands or permits the alien to land. Now

58 a statute is to be considered reasonably so as to give force and effect to all its provisions, if possible, and words are deemed to be used in their ordinary sense. Now if a captain under this

statute should take a man and let him go, say to him, 'Go off the ship and sever our relations; you go ashore,' he would then land him. If a man said to the captain: 'I am going ashore' and the captain knew that he was going ashore, or it was reported to him and he had reason to believe that he was going ashore, and he stood by and did nothing, then he would permit him to land, which would be a connivance and a concert of action between the alien and the captain that would be so apparent that, of course, the case would not be here. But suppose that he does not know in the particular case that the alien is going to desert the ship and land; that is, to go ashore for the purpose of remaining, or if he does go ashore without that intention and that he changes his mind afterwards and remains, still it is the duty of the captain to use due precaution, lest a member of his crew, an alien, does go ashore and fails to return. Now mark my words: 'Due precaution,' because the word 'permit' means to allow an opportunity. Another meaning is to take no steps to prevent. So if the captain of the ship does not use due precaution to shut off opportunity for this desertion and landing, due precaution to prevent the overt act which the alien does, then he would fall under the condemnation of the act."

16. That said Court erred in instructing the jury that they might take into consideration the desertion of twenty-three men on the same trip of the *Slavonia,* as appears in the following instruction given during the course of the charge to the jury:

"Now I have allowed evidence here of what happened. Twenty-three men deserted in this port and did not return to the ship. Now we are trying but one question of the guilt or innocence of the defendant as to this particular man, but the question of the
59 number of men that escaped from the vessel may be considered by you upon the question of whether he was using due precautions to prevent seamen escaping. Of course, if the case presented to you was that but one man escaped, the reflection upon the diligence of the captain or his officers, or both, would be quite different than if it was shown that the whole crew went ashore, and though you have a right—I am exaggerating this statement for the purpose of illustrating—when you come to consider the negligence of the captain, or of his using due precautions, if you find that twenty-three men escaped, the next question is, how does that bear upon his guilt or innocence in this case?"

17. That said Court erred in refusing to give to the jury the following instructions, as requested by defendant and plaintiff in error:

"I ask you to charge that even if the jury shall find that the defendant did not take due precautions to prevent landing, they must acquit him unless the landing was unlawful."

18. That said Court erred in refusing to give to the jury the following instruction, as requested by defendant and plaintiff in error:

"Where a seaman who had previously sailed on another ship signed at an European port after passing a physical examination as a regular member of a crew for the return voyage to New York and

back to Europe, and after he has declined an offer to be paid off and landed at Ellis Island, it was not unlawful for the defendant to grant him shore leave when his day's work was done, his pay being held back."

giving in lieu thereof the following:

"I do not say whether it was unlawful for him to do it or not. I say that it was not unlawful for him to allow the man to go ashore if he used the due precautions a good business man would use
60 with reference to the matter by discipline, by instructions, by rules or in any other way that would determine the propriety of his going ashore and the probability of his return."

19. That said Court erred in refusing to give to the jury the following instruction, as requested by defendant and plaintiff in error:

"Sec. 18 of the Immigration Act does not apply to an alien who at the time he came into the United States and left the ship was a *bona fide* member of the crew, bound to return with the ship to a foreign port and who left the ship with the intention of returning to it";

giving in lieu thereof the following:

"If he left the ship with the intention of returning, and changed his mind afterwards, that is simply one of those vicissitudes that might happen to any sailor going ashore, and that would simply bear upon the precautions the captain had to take with reference to such a person."

20. That said Court erred in refusing to give to the jury the following instruction, as requested by defendant and plaintiff in error:

"Sec. 18 of the Immigration Act did not require the defendant to prevent an alien member of the crew from leaving the vessel when off duty if he had no reason to anticipate that such alien intended to desert";

giving in lieu thereof the following:

"That the captain of the vessel had a right to let his crew or any member of the crew go ashore provided he used the precautions in determining the advisability of his going ashore with reference to his return, and took proper precautions to see to it that if he did go ashore he would return to the ship."

61 21. That said Court erred in refusing to give to the jury the following instruction, as requested by defendant and plaintiff in error:

"That under the provisions of Sec. 18 of the Immigration Act, the defendant cannot be convicted unless the jury is satisfied beyond a reasonable doubt that the defendant, by some affirmative act, or wilful act landed Ramadonawich or permitted him to land, at a place other than that designated by the Immigration authorities."

22. That said Court erred in refusing to give to the jury the following instruction, as requested by defendant and plaintiff in error:

"Unless the jury find that his duty to adopt due precautions required the defendant to endeavor to prevent this alien Ramadonawich from going ashore after his day's work was over, they must acquit.

Giving in lieu thereof the following:

"I charge that in determining whether the Captain had used due precautions they can take into consideration that he did go ashore at that time, if you assume that to be the fact, after his day's work was over. The mere fact that he went ashore after his day's work was over would simply bear on the question of the time he went. The circumstances under which he went the jury would consider in passing on the care of the captain."

23. That said Court erred in refusing to give to the jury the following instruction, as requested by defendant and plaintiff in error:

"That in considering whether or not the defendant adopted due precautions under the terms of Sec. 18 the jury may consider whether or not the refusal of shore leave after their day's work is done, to *bona fide* seamen whose records are clear, would tend to increase or diminish desertions from the crew."

62 24. That said Court erred in refusing to give to the jury the following instruction, as requested by defendant and plaintiff in error:

"That if the jury find that Elias Ramadonawich was a *bona fide* member of the crew and that he intended to return to the ship when he went ashore, permitting such going ashore was not permitting a landing under the terms of Sec. 18 of the Immigration Act."

25. That said Court erred in refusing to give to the jury the following instruction, as requested by defendant and plaintiff in error:

"If the jury find that the evidence before them is insufficient for them to determine what would have been the due precautions under Sec. 18 of the Immigration Act, which it was the duty of the defendant to adopt in regard to this alien, and to determine beyond a reasonable doubt that the defendant failed to adopt such precautions, the jury must acquit the defendant."

26. That said Court erred in overruling and denying the motion of counsel for the defendant and plaintiff in error, to set aside the verdict and for a new trial and arrest of judgment on the following grounds:

"1. Verdict is contrary to the evidence. The evidence did not show the defendant, beyond a reasonable doubt, to have been guilty of the crime charged in the indictment.

2. Errors in the admission and exclusion of evidence, noted at the time such evidence was received and excluded and exceptions then duly taken, all as shown in the minutes of the trial, require a new trial.

3. Errors in the denial of the defendant's motions for a dismissal of the indictment and for a direction of an acquittal on the grounds specified in the minutes of the trial and the exceptions then duly taken require a new trial.

63 4. Errors in charge of the court and in the refusal of the Court to charge as requested and to the amendments to the charge made by the Court, when the requests to charge were refused, and the exceptions then duly taken, all as appears in the minutes of the trial, require a new trial."

27. That said Court erred in passing sentence upon the verdict.

Wherefore said William F. D. Taylor, plaintiff in error prays that the judgment of the Circuit Court of the United States, for the Southern District of New York, be reversed, and that said Circuit Court be directed to grant a new trial on said indictment to said William F. D. Taylor.

New York, July 2, 1906.

LORD, DAY & LORD,
Attorneys for Plaintiff in Error and Defendant,
49 Wall Street, Borough of Manhattan, New York City.

(Endorsed:) United States Circuit Court, Southern Dist. of New York.—The United States of America, Plaintiff, against William F. D. Taylor, Defendant.—Assignments of Error.—Lord, Day & Lord, Attorneys for Wm. F. D. Taylor, Defendant and Plaintiff in Error, 49 Wall St., New York.—A copy of the within paper has been this day received at this office, Jul- 9, 1906. Henry L. Stimson, U. S. Attorney.—U. S. Circuit Court, Southern District New York.—Filed Jul- 2, 1906.—John A. Shields, Clerk.

64 Circuit Court of the United States, Southern District of New York.

THE UNITED STATES OF AMERICA, Plaintiff,
against
WILLIAM F. D. TAYLOR, Defendant.

Know all men by these presents:

That the Fidelity and Deposit Company of Maryland, having an office and principal place of business for the State of New York at No. 35 Wall street, in the Borough of Manhattan, City of New York, is held and firmly bound unto The United States of America, in the full and just sum of Two Hundred and Fifty Dollars ($250.00) to be paid to the said The United States of America, to which payment, well and truly to be made, the said Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with its seal, and dated this 22d day of June, nineteen hundred and six.

Whereas, lately at the Circuit Court of the United States for the Southern District of New York, in a suit depending in said Court between the United States of America, plaintiff, and William F. D. Taylor, defendant, a judgment was entered against said William F. D. Taylor, and the said William F. D. Taylor having obtained a writ of errer, and filed a copy thereof in the Clerk's office of
65 said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The United States of America, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in said Circuit, on the 16th day of October next;

Now, the condtion of the above obligation is such, that if the said Wiliam F. D. Taylor shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
By HUGH M. ALLWOOD,
[SEAL.] *Attorney in Fact.*

Attest:
JAMES R. KINGSLEY,
Attorney in Fact.

STATE OF NEW YORK, *County of New York, ss:*

On the 22nd day of June, in the year 1906, before me personally came James R. Kingsley, to me known, who, being by me duly sworn, did depose and say: That he resided in the City of New York; that he is the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Section 3, of Chapter 720, of the Session Laws of the State of New York, for the year 1893. And the said James R. Kingsley further said that he was acquainted with Hugh M. Allwood, and knew him to be the Attorney-in-Fact of said Company; that the signature of the said Hugh M. Allwood, subscribed to the within instrument, was in the genuine handwriting of the said Hugh M. Allwood, and was subscribed thereto by like order of the Board of Directors, and in the presence of him, the said James R. Kingsley.

66

ERNEST L. HICKS,
[SEAL.] *Notary Public, New York County.*

At a regular and lawful meeting of the Board of Directors of the Fidelity and Deposit Company of Maryland, at which a quorum was present, held at the office of the Company, in the City of Baltimore, State of Maryland, on the sixth day of March, 1901, on motion, it was unanimously

"*Resolved*, That in pursuance of Section eight hundred and eleven "of the Code of Civil Procedure of the State of New York, Henry B. "Platt, Vice-President, or George Sewell Bonner, Attorney, or Frank "H. Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood "and James R. Kingsley, Attorneys-in-Fact of this Company, in "the State of New York, be, and each of them is, hereby authorized "and empowered to sign, execute and deliver any and all bonds or "undertakings for or on behalf of this Company, and to attach

"thereto the seal of the corporation, the same to be attested by the "said George Sewell Bonner, Attorney of the Company, or by either "one of the other persons above named, as occasion may require."

COUNTY OF NEW YORK, *ss:*

I, James R. Kingsley, Attorney-in-Fact of the Fidelity and Deposit Company, of Maryland, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same is a true and
67 correct transcript therefrom, and of the whole of the said original Resolution.

Given under my hand and the seal of the Company, at the City of New York, this 22nd day of June, 1906.

JAMES R. KINGSLEY,
[SEAL.] *Attorney-in-Fact.*

Fidelity and Deposit Company of Maryland.

Statement, December 30th, 1905.

Resources.		Liabilities.	
Real Estate	$757,000 00	Capital Stock	$2,000,000 00
Stocks and Bonds	3,451,925 00	Surplus and Undivided Profits	2,726,700 56
Railroad Bonds	1,231,250 00	Premium Reserve Requirement	718,091 62
British Consols	239,500 00	Reserve for Contingent Claims	664,787 60
Net Premiums Due	102,875 62	Claims Adjusted (Checks out)	5,015 48
Cash in Bank, etc	367,943 19	Claims in Process of Adjustment	35,898 55
	$6,150,493 81		$6,150,493 81

68 STATE OF NEW YORK, *County of New York, ss:*

James R. Kingsley, being duly sworn, says; That he is the Attorney-in-Fact of the Fidelity and Deposit Company of Maryland; that the foregoing is a true and correct statement of the financial condition of said Company, as of December 30th, 1905, to the best of his knowledge and belief, and that the financial condition of said Company is as favorable now as it was when such statement was made.

JAMES R. KINGSLEY.

Subscribed and sworn to before me, this 22nd day of June, 1906.

ERNEST L. HICKS,
[SEAL.] *Notary Public, New York County.*

(Endorsed:)—Circuit Court of the U. S., Southern District of N. Y.—The United States of America, Plaintiff, against William F. D. Taylor, Defendant.—Bond.—Approved as to form and also as to sufficiency of sureties, with reservation, however, to the Pl'ff-Def't

in error, of the right at any time to examine the proper officers of the Surety Company under oath, touching its assets, liabilities and financial condition generally. E. H. Lacombe, U. S. Circuit Judge.—A copy of the within paper has been this day received at this office. July 9, 1906. Henry L. Stimson, U. S. Attorney.—U. S. Circuit Court, Southern District of New York.—Filed Jul- 5, 1906.—John A. Shield, Clerk.

69 By the Honorable E. Henry Lacombe, one of the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, on the 1st day of August, 1906, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York, wherein William F. D. Taylor is plaintiff in error, and you are defendant in error to show cause, if any there be, why the errors in said writ mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 2d day of July, in the year of our Lord one thousand nine hundred and six, and of the Independence of these United States the one hundred and thirty.

E. H. LACOMBE,

Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit.—William F. D. Taylor, Plaintiff-in-error, *vs.* The United of America, Defendant in error.—Citation.—A copy of the within paper has been this day received at this office. Jul- 9, 1906. Henry L. Stimson, U. S. Attorney.—U. S. Circuit Court.—Filed Jul- 9, 1906.—Southern District New York.—John A. Shield, Clerk.

70 United States Circuit Court of Appeals for the Second Circuit.

No. 191, October Term, 1906.

Argued December 19, 1906, Decided January 16, 1907.

WILLIAM F. D. TAYLOR, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of New York.

Before Judges Wallace, Lacombe, and Townsend.

This cause comes here upon a writ of error to review a judgment of the Circuit Court, Southern District of New York, entered May 21, 1906, on a verdict of "guilty" found by a jury after trial upon an indictment for a misdemeanor under Section 18 of the Immigration Act of 1903 which provides:

"That it shall be the duty of the owners, officers and agents of any vessel bringing an alien to the United States to adopt due precautions to prevent the landing of any such alien from such vessel at any time or place other than that designated by the immigration officers, and any such owner, officer, agent, or person in charge of such vessel who shall land or permit to land any alien at any
71 time or place other than that designated by the immigration officers shall be deemed guilty of a misdemeanor, and shall on conviction be punished by a fine for each alien so permitted to land of not less than one hundred or more than one thousand dollars, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment."

LACOMBE, *Circuit Judge:*

Taylor was the captain of the Cunard S. S. *"Slavonia,"* which arrived at her pier in New York City early in the morning of October 10, 1905, at the end of a voyage from Fiume, Hungary. At the time of her arrival the place of landing designated under the statute by the immigration officers for aliens landing from a vessel was Ellis Island. When the *"Slavonia"* was at Fiume one Elias Ramadonawich, an alien, shipped on her as third cook in the steerage kitchen. He had previously served on an Austrian ship, and showed his previous shipping papers when he signed the articles of the *"Slavonia."* He shipped for the round trip the terms of the articles being that he should not be paid off until he returned to Fiume. The amount of wages earned by him on his arrival in New York was less than six dollars.

At a quarter of six o'clock in evening of October 10th, after finishing his day's work he reported to the head of his department that his work was finished but asked no permission of him, or of

any one else, to go ashore. He then went to his room and washed and dressed. After this, with two other members of the crew, he walked down the gang plank out on the pier and into West Street. No one stopped him either on the gang-plank or on the pier, or interfered in any way with his departure. So far as appears his record during the short time of his service was good. It was the rule of the ship that members of the crew whose records were good could go ashore after the day's work was over, each department merely keeping enough of its force to do the necessary night duty. No ticket of leave, or written permission to the seaman desiring to go ashore was issued, nor any means provided to inform the watchman at the gang-plank or on the pier whether any of the crew seeking to go past him had permission to go ashore or not. It does not appear whether on the evening in question there was any watchman,
72 but Ramadonawich saw none, and from defendant's statement of the rule or custom of the ship when in port here it is not apparent that if he had been there it would have been his duty to make any inquiry before allowing any of crew to walk off the pier into the city streets.

Ramadonawich never returned to the ship, so that his landing became, as defendant's counsel expresses it "the ordinary desertion of a roving seaman in a foreign port." The immigration officers first learned of his presence in this country from a letter dated November 10, 1905, received from the Superintendent of the Flatbush Poor-house; an inspector went in search of him and found him (November 28th) in the Metropolitan Hospital where he had been for sixteen days. Evidently it did not take long for him to "become a public charge."

The court instructed the jury that under section 18 "if the captain of the ship does not use due precaution to shut off opportunity for * * * desertion and landing; due precaution to prevent the overt act which the alien does, *then* he would fall under the condemnation of the act." Elsewhere he instructed them: "it is his duty to exercise the care that any good business man in that occupation would exercise; take the precautions that such a man would take and see to it that men who are aliens and part of his crew, if allowed to go ashore should be allowed to do so under such rules, discipline and restraint as would tend to bring them back to the ship. Now if the captain has done that he has done his whole duty and that is the essential thing for you to grasp and say what would a typical business man in that occupation have done under those circumstances." This seems to us an entirely fair and reasonable construction of this section: it gives force to all the clauses of its single sentence, coupling the penal provisions against *permitting* to land with the provisions requiring the adoption of due precautions against such landing, and thus making the test of offence committed not the alien's mere landing but the failure to adopt due precautions to prevent it. The statute certainly was not intended to make the owners, officers, and agents insurers against the escape of every alien who might be on board the vessel when she reached this port, and

the language used does not require so harsh a construction;
73 the careful and prudent man who can satisfy a jury that he adopted precautions reasonably adequate to prevent the landing need be under no apprehension that he incurs a penalty whenever an alien who has arrived in his ship steps ashore.

There was evidence which is discussed in the briefs as to the desertion of seamen generally in the port of New York; as to granting shore leave; as to the extent to which seamen can be confined to the ship. None of this need be considered here; it deals with the question whether due precautions were taken, and that question was one wholly for the jury under proper instructions.

The main contention of plaintiff in error is that the word "alien" in Section 18 does not include seamen.

The reasons why we do not find this contention persuasive may be briefly stated.

The word alien is a broad one, with a definition wholly unambiguous and clearly understood by all, lawyers and laymen alike. To warrant a construction, which will restrict the meaning of such a word deliberately selected by the draughtsman of a statute, there must be something highly persuasive to show an intent not as far reaching as the use of such a word would import. The Supreme Court in Holy Trinity Church *v.* U. S. (143 U. S. 457) construing an earlier immigration statute found that certain broad language used therein should be given a restricted meaning, because of the "familiar rule that a thing may be within the letter of the statute and yet not within its spirit, nor within the intention of its makers." But as was subsequently pointed out by the same court such cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent, for the "lawmaker is presumed to know the meaning of words and the rules of grammar." As in that case (U. S. *v.* Goldenberg 168) so in this the language of the act, interpreted in its ordinary sense, "does not offend the moral sense, Holy Trinity Church *v.* U. S. (143 U. S. 457); it involves no injustice, oppression or absurdity, U. S. *v.* Kirby (7 Wall. 482); McKee *v.* U. S. (164 U. S. 287)."

It may safely be assumed that the surest guide to the intent of a legislative body will be found in the recorded action of that body itself. Examination of these so-called "immigration statutes"
74 discloses the fact that they have been frequently amended and recast, almost always in the direction of a more drastic exclusion. A review of some of these changes, following decisions of the courts which tended to relax the provisions of earlier acts will be found *In re* Ellis (124 F. R. 637).

Turning then to the statute book we find that Section 18 of the Act of 1903 (now under consideration) substantially reenacts part of Section 8 of the Act of March 3, 1891. In the earlier statute it was made the duty of officers of vessels to adopt due precautions to prevent the landing "of any alien immigrant;" the later statute makes it the duty of these officers to prevent the landing "of any alien" (omitting the word "immigrant"). "Alien immigrant" is

a less comprehensive term than "alien," and when it is deliberately discarded for the broader term, the change is highly significant. That the change was deliberate is also apparent; it was no single instance which might be accounted for by some clerical oversight. In sections 12, 13, 17, 20 the term "alien" was substituted for the term "alien immigrant" found in earlier acts (See Sec. 8, Act of March 3, 1891; Secs. 1, 2 and 6, Act of March 3, 1893; Act of October 19, 1888, C. 1210). Significantly also the Act refers, in Section 2, to the "admission," not the immigration, of the excluded classes of aliens; in Section 3 to the "importation," not merely the immigration, of prostitutes; in Sections 4, 5, and 6 to "importation or migration" of contract laborers; in Section 9 to the "bringing to the United States of any alien afflicted with a loathsome or contagious disease;" in Sections 12 and 13 to the "arrival of any alien;" in Section 19 to "all aliens brought into this country in violation of law;" in Section 20 to "any alien who shall come into the United States in violation of law;" in Section 24 to "the right of any alien to enter the United States;" and in Section 38 to the permitting of any "person who disbelieves in * * * organized government * * * to enter the United States."

Such action by Congress would seem to indicate an intent to use the word "alien" in its ordinary and comprehensive meaning.

The diligence of counsel on both sides has submitted excerpts from the reports of committees and the debates in Congress upon this Act while on its passage. It is sufficient to refer to
75 them without quoting, they clearly indicate that Congress was satisfied that the use of the word "immigrant" had given rise to a construction of the earlier acts which rendered them inadequate to accomplish their purpose, and made it necessary to adopt the broader term "alien." (57th Congress, First Session, 9 Sen. Rep. No. 2119; Congressional Record 57th Congress 1st Sess. Vol. 35 part 6 p. 5764; 57th Congress 1st Sess. H. R. Rep. No. 982; Cong. Rec. 57th Congress 1st Session p. 5763; Cong. Rec. 9 Sen. R. No. 2119 p. 137; Cong. Rec. 57th Cong. 1st Sess. p. 5816; 57th Cong. 1st Sess. 9 Sen. Rep. No. 2119, p. 135; 57th Cong. 1st Sess. Sen. Rep. No. 2119 pp. 152, 130; 57th Cong. 2nd Sess. 37 Cong. Rec. Part I, pp. 135-6.)

In view of such an illumination as to the intent of Congress the mere circumstance that the title is "An Act to Regulate the Immigration of Aliens into the United States" is immaterial.

The reasons urged by plaintiff in error for construing the section so as to read "aliens, other than *bona fide* members of a ship's crew" may next be considered. It is suggested that the crew of a vessel cannot properly be held to be "brought to the United States" by such vessel, because the word "bring" is used in the sense of "import" Cunard Co. *v.* Stranahan (134 F. R. 318). We do not see why seamen, who upon arrival become "importations" by leaving the ship and entering into the general body of resident population, are not "brought" here by the vessel as much as its passengers are.

It is next suggested that the statute, if held to cover seamen, would be so harsh and oppressive that it cannot be supposed that

Congress would have passed such an act; and it is argued that every time an alien seaman or officer went ashore to report to his ship's owner, or to the consul or to the customs authorities the master would be liable to fine and imprisonment. This puts an unreasonable construction on the act; the offence is failure to provide due precautions against landing. It could not be held that there was any such failure when a trusted and apparently trustworthy officer or seaman was thus engaged temporarily on shore about the ship's business. Where a Chinese exclusion act made it a misdemeanor for the master of a vessel "to land or permit to be landed" any Chinese laborer it was held that Chinese seamen would have
76 the "right to be on shore temporarily and not otherwise employed than in the business of the vessel during her stay in port." *In re* Moncan (14 F. R. 44). See also *In re* Ah Kee (22 F. R. 519); *In re* Jam (101 F. R. 989).

Reference is made to U. S. *v.* Burke (99 F. R. 895) and Moffitt *v.* U. S. (128 F. R. 375), as holding that the term "all aliens" did not include seamen. The opinions in both these cases show clearly that the conclusion of the court was induced by the circumstance that the statutes down to that date (1891) were directed only against the admission of "alien immigrants;" but as we have seen the present act is textually, and apparently intentionally, of broader scope.

Attention is called to various sections of the act providing that the master shall deliver to the customs officers lists or manifests which shall state as to each alien his name and sex whether he has a ticket to final destination and whether the alien has paid his own passage; that all aliens arriving by water shall be listed in convenient groups and each head of a family given a tag or ticket of identification, and that the immigration officers may temporarily remove the aliens so listed for examination. And comment is made on the absurdity of requiring the Captain with all the officers and crew of a foreign ship, manned wholly by aliens, to list and tag themselves and proceed to Ellis Island leaving the ship without any persons in charge even to watch her, much less to work and navigate her. These difficulties however are more apparent than real. When a vessel brings to this country aliens who, by coming aboard as passengers under no contract to return, have advised the captain that upon arrival they expect to leave the ship permanently and disappear into the general body of the population, he must take the steps to assist the immigration officers which these sections require; but where he is not thus advised, as in the case of a seaman of his crew who has signed articles for return voyage, he will discharge his full duty if he adopts due precautions to prevent that alien from effecting a landing which will defeat the objects of the statute by enabling him to become a part of the national population without having first been passed by the examining officers.

77 We find no error in the refusal of the court to allow testimony as to the practice of the immigration office, and as to its recommendations touching further legislation. Departmental construction is of value only in construing ambiguous provisions of statute, but we find no ambiguity in section 18. Nor do we find

merit in the contention that the testimony was insufficient to support the verdict. In the case of an alien who had been a permanent member of the crew for years, proud it may be of his ship and loyal to her flag, careful never to abuse any privilege of shore leave, it might be sufficient to let him go and come as he pleased while the ship was in port. But the same latitude in the case of an unknown alien of some other nationality than the ship, who was no sailorman, but merely a scullion or a waiter, might well be found to constitute a failure to adopt due precautions. The question was properly submitted to the jury under a charge which carefully instructed them in all essential points and which was not excepted to. There was no error in refusing a request to instruct them further that they might consider whether refusal of shore leave would tend to increase or diminish desertions; that was not the question for them to decide. They were substantially instructed that they could not convict unless they found that there were precautions which a reasonable man would have adopted but which the captain failed to take. The last request made on behalf of defendant (they are not numbered) merely stated this proposition in another form.

Upon cross-examination the defendant was asked whether during the trip of the *Slavonia* then under consideration and during her stay in New York October 10th to October 17th twenty-two other alien seamen besides Ramadonawitch did not desert the ship. Counsel objected to this as immaterial, and because an answer would require defendant to incriminate himself as to other crimes; objection was overruled and exception reserved. The question of privilege is not before the court, since the witness did not stand on his privilege but answered the question. Morgan *v.* Halberstadt (60 F. R. 592). The testimony was clearly relevant to the main issue in the cause, namely, whether during the stay of the *Slavonia* in this port Captain Taylor was adopting due precautions to
78 prevent the landing of aliens from his ship. Information as to all the circumstances would certainly be helpful towards a conclusion, and there is no provision of law which would require the exclusion of such testimony on the theory that it tended to show the commission of other offenses against the same statute. Packer *v.* U. S. (106 F. R. 906).

The judgment is affirmed.

William G. Choate, for the Plaintiff in Error.

Henry L. Stimson and Michael Byrne, for the Defendant in Error.

79 United States Circuit Court of Appeals for the Second Circuit.

No. 191, October Term, 1906.

Argued December 19, 1906; Decided January 16, 1907.

WILLIAM F. D. TAYLOR, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of New York.

Before Judges Wallace, Lacombe, and Townsend.

WALLACE, *Circuit Judge:*

I dissent from the Judgment of the Court. I think the statutory provision under which the defendant was indicted is not to be construed as embracing sailors who are *bona fide* members of a ship's crew. It is true the section penalizes the landing of "any alien," and the term, read without reference to the context, or the history of the legislation of which it is a part, or the well known objects of this legislation, is broad enough to include a sailor. It is also broad enough to include the ambassador of a foreign government to our own, who comes here by vessel to enter upon the duties of his post.

The act of March 3, 1903, is a collection and revision of several preexisting laws of Congress, some of which relate to the exclusion from the United States of objectionable immigrants, and
80 others, to the importation of aliens who were under contract to perform labor or services. It is entitled "An Act to regulate the immigration of aliens into the United States." In the earlier acts those relating to the exclusion of objectionable immigrants usually employed the term "alien immigrants." In those relating to the importation of contract laborers the term "foreigners" or "aliens" was used, possibly because such laborers might come either as immigrants, that is, with the purpose of acquiring a permanent residence here, or they might come as temporary sojourners, remaining only to perform the particular engagement which they had entered into; and the term "foreigners" or "aliens" was sufficiently broad to include both classes. In the revision of 1903 the short and comprehensive term "aliens" was used throughout, as well in the provisions particularly relating to immigrants, as in those relating to contract laborers. In codifications and revisions changes of phraseology for the sake of brevity or consistency are frequently made, and should not be construed as intended to make a radical change in the previous laws, unless the language plainly contemplates the intention to make such a change.

Taylor *v.* Delancey (2 King's Cases 143, 151).
Chancellor Kent in Godell *v.* Jackson (20 John. 693).
United States *v.* Dauphin (20 Fed. Rep. 625).

There are two provisions, and only two, in the act of 1903 making it a misdemeanor for the master of a vessel to land aliens. One of these is section 8. This provision originated in section 4 of the act of February 28, 1885, to prohibit the importation of contract laborers, and made it a misdemeanor to knowingly land or permit to be landed "any alien laborer, mechanic or artisan" who previous to his embarkation was under contract. Section 4 was reenacted in the act of March 3, 1891, (section 6) in somewhat different language, whereby it was made a misdemeanor to bring into or land in the United States "any alien not lawfully entitled to enter." That act enumerated the aliens who were not entitled to enter as belonging to two classes only, immigrants or contract
81 laborers. Obviously section 8 of the present act is merely a reproduction of the former laws which apply only to these two classes of aliens. The other provision, section 18, under which the plaintiff in error was indicted, is less comprehensive than section 8. The misdemeanor thereby created consists in permitting to land without due precautions to prevent it, "any such alien from such vessel," as is mentioned in the previous sections of the act and particularly in section 13. Section 13 provides that all aliens arriving by water shall be listed in convenient groups, and each list be verified by the oath of the master of the vessel that he believes "that no one of said aliens is an idiot, or insane person, or pauper, or likely to become a public charge, or is suffering from a loathsome or dangerous contagious disease, or is a person who has been convicted of felony or other crime involving turpitude, or a polygamist, or an anarchist, or not under promise, express or implied, to perform labor in the United States, or a prostitute."

The offense consists in landing or permitting to land any alien "at any place other than that designated by the immigration officers." Section 16 makes it the duty of the immigration officers to inspect all such aliens as are mentioned in section 13, and empowers them to "order a temporary removal of such aliens for examination at a designated time and place;" and this is the only provision of the act authorizing the designation of any "time or place" by the immigration officers.

Section 18 is a part of section 8 of the act of 1891, which only applied to aliens who are immigrants, but as it uses the term "any aliens" instead of the term "any alien immigrant" it should be construed as applicable not only to alien immigrants but to all aliens of the previously enumerated classes. Even if it were not by its terms applicable only to "such aliens," those mentioned in the preceding sections, it would be by implication, because it is to be read with all the provisions of the act *in pari materia*. This is not only a general rule of statutory interpretation but it is one which
82 is especially applicable to a general code or statutory revision. As to these the rule of construction is that the enactment is intended to form one system of statutory laws contemporaneous in time, and all the sections dealing with the same subject matter are to be construed as one statute. The accepted canons of interpreta-

tion of all statutes require every part of the act to be taken into view for the purpose of ascertaining the legislative intent; restrict general expressions whenever necessary to make all the parts harmonize and give an intelligible effect to each; and limit the application of general terms so as not to lead to injustice or an absurd conclusion.

U. S. *v.* Terra Cotta Vases (18 Fed. Rep. 510).
Case of Chinese Merchant (13 Fed. Rep. 605);
Carlisle *v.* U. S. (16 Wall. 153).

Section 2 is devoted to a preliminary enumeration of the classes of aliens who "shall be excluded from admission into the United States." This enumeration is somewhat more in detail than that contemplated by the provisions of section 13, but does not necessarily include any aliens who do not come intending to reside in the United States, and does not mention sailors. There is not a provision in the act which indicates any intention to embrace sailors in the classes of aliens to be excluded, otherwise than by the mere use of the term "aliens." Many of the provisions in which the classes are referred to by this comprehensive term, are such as would be absurd, if they were intended to apply to sailors. Section 13 is an illustration; and it can hardly be seriously argued that here Congress intended to require the master of the vessel to give each seaman a ticket to identify himself and his family, and then to require the master to swear that he believes that no one of his sailors is an idiot or a prostitute.

These considerations would suffice to lead to the conclusion that section 18 does not by reasonable construction include sailors under the general term "any aliens;" but they are reinforced be-
83 cause at the time of the enactment it was perfectly well under stood that the alien exclusion laws did not apply to sailors. This had been so decided in United States *v.* Sandrey (48 Fed. Rep. 550), and in United States *v.* Burke (99 Fed. Rep. 895).

In the latter of these cases the Court said:

"These statutes do not contemplate the exclusion of crews of vessels which lawfully trade in our ports, and they do not, in spirit or in letter, apply to seamen engaged in either calling, whose home is on the sea; who are here to-day and gone to-morrow; who come on a vessel into the United States with no purpose to reside therein, but with the intention when they come of leaving again on that or some other vessel, for the port of shipment or some other foreign port in the course of her trade. To hold that these statutes apply to aliens comprising the *bona fide* crews of vessels engaged in commerce between the United States and foreign countries would lead to great injustice to such vessels, oppression to their crews, and serious injuries to commerce."

The Attorney General of the United States had formulated an opinion on the subject to the same effect, and had so advised that department of the Government charged with the administration of the alien exclusion laws. He said:

"that although it was true that Congress had not excepted them seamen from the express language of these statutes, in the practical administration of these laws they have always been excepted, and

their inclusion in the class of alien immigrants would lead to consequences so destructive to legitimate commerce, that such inclusion could fairly be regarded as beyond the intention of Congress."

Vol. 23 Op. Atty. Gen., 521.

In view of the decisions of the federal courts whenever the
84 question had been presented, the opinion of the chief law officer of the Government, and the construction which had been placed upon the preexisting legislation by the administrative officers of the Government, the circumstances that in the revision no change was made specifically enlarging the class of prohibited aliens so as to include sailors, is significant that Congress had no intention of including them.

The majority opinion adopts a construction of the statute which has not hitherto been supposed possible by the head of the Immigration Bureau. In his last official report, that of 1895, the Commissioner General of Immigration recommends that legislation should be adopted

"to check violations of the immigration laws by professed seamen, and imposing a penalty upon masters for signing other than *bona fide* seamen upon their crew lists."

The majority opinion, in order to obviate the hardship and inconvenience which would result if alien seamen are included in the statute, attempts to mitigate these consequences by giving a more liberal interpretation to the term "landing" than is permitted by the language of the section. The opinion virtually declares that if seamen are allowed to go ashore under such rules, discipline and restraint as would tend to bring them back to the ship, they are not "landed" within the meaning of the section. According to the accepted meaning the act of landing is "setting on shore; coming on shore." Giving the language of the section its ordinary meaning, it is none the less an offense to land a sailor that he has been landed under precautions which will ensure his return to the ship. If sailors are included in the statute, it seems plain that they cannot be permitted to go ashore by the officers or the owner of a vessel, and any failure to take sufficient precautions in that behalf is a violation of the section. I cannot agree to such a latitudinarian construction of the statute for the purpose of eliminating its objectionable features and fortifying the argument that Congress intended to include sailors.

Congress either intended to include sailors under the gen-
85 eral term of aliens, or it did not. The majority opinion is based merely on the employment by Congress of the broad term. If Congress by the use of this term intended to include sailors, it intended to include the officers of the ship; and the commanders of nearly all the foreign steamships, as well as the officers of foreign naval vessels upon a visit here, would be included in the term.

I think the conviction of the plaintiff in error proceeded upon a wrong interpretation of the statute, and that it should therefore be reversed.

86 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit held at the Court Rooms in the Post Office Building in the City of New York, on the 26th day of January one thousand nine hundred and seven.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. William K. Townsend, Hon. Alfred C. Coxe, Circuit Judges.

WILLIAM F. D. TAYLOR, Plaintiff in Error,
vs.
UNITED STATES, Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said Circuit Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

W. J. W.
E. H. L.
W. K. T.

87 Endorsed: United States Circuit Court of Appeals, Second Circuit. W. F. D. Taylor *vs.* U. S. Order for mandate. United States Circuit Court of Appeals Second Circuit Filed Jan. 30, 1907. William Parkin, Clerk.

88 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 87 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of W. F. D. Taylor against United States, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 6th day of February in the year of our Lord One Thousand Nine Hundred and Seven and of the Independence of the United States the One Hundred and thirty-first.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

89 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which William F. D. Taylor is plaintiff in error, and The United States is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the
90 United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixth day of March, in the year of our Lord one thousand nine hundred and seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

91 [Endorsed:] File No. 20,581. Supreme Court of the United States. No. 616, October Term, 1906. Wm. F. D. Taylor, *vs.* The United States. Writ of certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 7, 1907. William Parkin, Clerk.

92 Supreme Court of the United States.

WILLIAM F. D. TAYLOR, Plaintiff in Error,
vs.
UNITED STATES, Defendant in Error.

On Writ of Error to the United States Circuit Court of Appeals for the Second Circuit.

It is hereby stipulated that the transcript already filed in the office of the Clerk of the Supreme Court of the United States, with the petition for the writ of certiorari herein, be taken as a return to said writ dated the 6th day of March, 1907.

Dated March 7, 1907.

LUCIUS H. BEERS,
Counsel for Plaintiff in Error.
HENRY L. STIMSON,
Counsel for Defendant in Error.

Endorsed: Supreme Court of the United States. William F. D. Taylor, Plaintiff in Error against United States, Defendant in Error. Stipulation. Lucius H. Beers, counsel for Plaintiff in error, 49 Wall Street, New York. United States Circuit Court of Appeals Second Circuit Filed Mar. 7 1907. William Parkin, Clerk.

93 To the Supreme Court of the United States:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the Clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as a return to the writ of certiorari issued herein.

Dated New York March 8, 1907.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals, for the Second Circuit.

94 [Endorsed:] 616, 20581. United States Circuit Court of Appeals, Second Circuit. W. F. D. Taylor, *v.* United States. Return to Certiorari.

95 [Endorsed:] File No. 20,581. Supreme Court U. S. October Term, 1907. Term No. 238. Wm. F. D. Taylor, Petitioner, *vs.* The United States. Writ of certiorari and return. Filed March 9", 1907.

EVENING POST JOB PRINTING OFFICE, NEW YORK

Supreme Court of the United States.

WILLIAM F. D. TAYLOR,
Petitioner,

AGAINST

UNITED STATES,
Respondent.

October
Term, 1906.

Petition for Writ of Certiorari.

Requiring Circuit Court of Appeals for the Second Circuit to certify to the Supreme Court for its review and determination the case of William F. D. Taylor, plaintiff in error, against the United States, defendant in error.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES.

The petition of William F. D. Taylor shows to this Honorable Court as follows:

I.—That your petitioner is a captain in the service of the Cunard Steamship Company, Limited, and was indicted in the Southern District of New York under Section 18 of the Immigration Act of 1903, which Section provides as follows:

> "That it shall be the duty of the owners, "officers and agents of any vessel bringing

> "an alien to the United States to adopt due "precautions to prevent the landing of any "such alien from such vessel at any time or "place other than that designated by the "immigration officers, and any such owner, "officer, agent, or person in charge of such "vessel who shall land or permit to land any "alien at any time or place other than that "designated by the immigration officers, "shall be deemed guilty of a misdemeanor, "and shall on conviction be punished by a "fine for each alien so permitted to land of "not less than one hundred nor more than "one thousand dollars, or by imprisonment "for a term not exceeding one year, or by "both such fine and imprisonment, * * *"

II.—That the indictment charged that your petitioner was Captain of the steamship *Slavonia;* that he brought on said vessel from a foreign country to the Port of New York one Elias Ramadonawich, an alien, and that

> "without adopting due precautions to pre-"vent the landing from the same of the said "alien, as provided by law, then and there "did unlawfully and wilfully land, or per-"mit to land, in the said district, the said "alien at a place other than that designated "by the immigration officers at said port, "that is to say, at the pier of the said steam-"ship instead of at the immigration station "at Ellis Island."

III.—That on the 18th and 19th days of May, 1906, your petitioner was tried on said charge before the Hon. Edward B. Thomas, District Judge, and a jury in the United States Circuit Court for the Southern District of New York.

IV.—That it appeared by the evidence put in by the Government:

> (*a*) That said Elias Ramadonawich was a *bona fide* member of the crew of the steamship *Slavonia*,

(*b*) That he duly shipped as a cook at Fiume, Hungary, for the round voyage to New York and back to Fiume, and to be paid off in Fiume.

(*c*) That he had previously been a member of the crew of an Austrian ship, and when he signed the articles of the *Slavonia*, he showed his previous shipping papers.

(*d*) That he was not paid off in New York; that at the close of his day's work on the first day the ship was in the port of New York he went on shore to take a walk.

(*e*) That when he left the ship to go ashore he intended to return to the ship, but that after he was in the city he decided not to return and deserted.

V.—That it appeared by the testimony of your petitioner and was not contradicted by the Government:

(*a*) That the rules relating to shore leave which were laid down by your pettioner for the regulation of the crew of the *Slavonia* permitted members of the crew of good behavior to have the usual leave in the evening if their services were not required on the ship, on their obtaining the permission from the head of their own department before going ashore.

(*b*) That the conduct of the said Elias Ramadonawich during the voyage to New York was good and gave no indication of any intention on his part to desert.

VI.—That it appeared by the evidence put in by the Government that the said Elias Ramadonawich had finished his work for the day and was off duty before he went ashore to take a walk, and the

only violation of the rules laid down by your Petitioner involved in his leaving the ship to take a walk as he did was that he did not first obtain the permission of the head of his department, but nothing was shown by the Government to indicate that he was not entitled to such permission.

VII.—That there was no evidence or suggestion offered on the part of the Government in this case that the said Elias Ramadonawich was not a *bona fide* member of the crew of the steamship *Slavonia*, or that he had shipped on the *Slavonia* for the purpose of immigrating to the United States or for the purpose of evading any of the provisions of the Immigration Laws of the United States.

VIII.—That there was no evidence or suggestion offered on the part of the Government that your Petitioner, or any other officer of the steamship *Slavonia*, or any other officer or employee of the Cunard Steamship Company had in any way directly or indirectly sought to bring to the United States either the said Elias Ramadonawich or any other alien in such a way as to evade or defeat the provisions of the Immigration Laws of the United States.

IX.—That the desertion of the said Elias Ramadonawich at the Port of New York was a typical case of an ordinary desertion of a seaman in a foreign port, and was so treated in the opinions of the Judges of the Circuit Court of Appeals.

X.—That it was proved at the trial of this action that it is the uniform custom in the Port of New York that seamen shall have reasonable shore leave when off duty.

XI.—That it was proved at the trial of this action that desertions are of frequent occurrence and

cannot be entirely prevented unless seamen are confined on the ship when in port, and that in a case where your Petitioner as captain of a steamship attempted to refuse shore leave and confined the crew to the ship, the crew refused to perform duty.

XII.—That at the close of the Government's case a motion was made on behalf of your Petitioner for a dismissal of the indictment and for a direction to the jury to acquit your Petitioner on the following ground, among others:

> "The evidence shows that the alien in "question was a *bona fide* member of the "crew of the *Slavonia* articled to return on "the *Slavonia* to the foreign port from which "he shipped. The term 'alien' as used in the "act of 1903 and in section 18 thereof, means " alien passenger, and does not include such "a member of the crew."

But your Petitioner's said motion was denied, and an exception was duly taken.

And on the close of the case a motion was made on behalf of your Petitioner for a direction of acquittal on various grounds, including the ground above stated, but said motion was denied and an exception was duly taken.

XIII.—That on behalf of your petitioner the trial judge was duly requested among other things to charge:

> "That section 18 of the Immigration Act "does not apply to an alien who at the time "he came into the United States and left "the ship was a *bona fide* member of the "crew, bound to return with the ship to a "foreign port, and who left the ship with the "intention of returning to it."

And that in response to such request the trial judge charged:

> "If he left the ship with the intention of "returning and changed his mind afterwards 'that is simply one of those vicissitudes that "might happen to any sailor going ashore, "and that would simply bear upon the pre-"cautions the captain had to take with refer-"ence to such a person."

And that the trial judge refused to charge as so requested and an exception was duly taken.

XIV.—That the charge of the Judge as to the construction of the statute in its application to alien seamen was as follows:

> "Now you see that the statute says that it "shall be the duty of the officer to adopt due "precaution to prevent landing, and that he "is punishable if he lands or permits the "alien to land. Now a statute is to be con-"sidered reasonably so as to give force and "effect to all its provisions, if possible, and "words are deemed to be used in their or-"dinary sense. Now if a captain under this "statute should take a man and let him go; "say to him: 'Go off the ship and sever our "relations; you go ashore,' he would then "land him. If a man said to the captain: "'I am going ashore,' and the captain knew "that he was going ashore, or it was reported "to him and he had reason to believe that "he was going ashore, and he stood by and "did nothing, then he would permit him to "land, which would be a connivance and a "concert of action between the alien and "the captain that would be so apparent that "of course the case would not be here. But "suppose that he does not know in the par-"ticular case that the alien is going to de-"sert the ship and land; that is, to go ashore "for the purpose of remaining, or if he does "go ashore without that intention and that "he changes his mind afterwards and re-"mains, still it is the duty of the captain "to use due precaution lest a member of his

'crew, an alien, does go ashore and fails to "return. Now mark my words: 'Due pre- "caution,' because the word 'permit' means "to allow an opportunity. Another meaning "is to take no steps to prevent. So if the "captain of the ship does not use due precau- "tion to shut off opportunity for this deser- "tion and landing; due precaution to pre- "vent the overt act which the alien does, "then he would fall under the condemnation "of the act.

"So you have the situation here. He al- "lows members of his crew to go ashore; "he allows them to land, but not with the "expectation that they will remain on the "land. The act itself is wilful, so far as "his going ashore is concerned, because he "makes it a rule that any member of the "crew may go ashore upon obtaining con- "sent. Then the question comes down to "this, looking at it sensibly; assuming that "it is right, and just and necessary that he "should allow his crew, when in port, to "go upon the shore temporarily with the "expectation that they will come back to "the ship, has he nevertheless been so ne- "glectful that he has not taken due precau- "tion to see to it that men go ashore under "such constraint and restrictions that they "will come back to the ship.

"Now take each case as it comes up. He "has men in his crew that have sailed with "him for years. I don't know how that may "be; it is an illustration. Men who are per- "fectly reliable. He knows that when that "man goes ashore that he will come back; "that if the man goes ashore under the prom- "ise to come back he knows that the man "will keep his promise and come back. He "may have members of the crew of whom "he has no knowledge, and of whose pur- "poses and intention and character he has "no knowledge. The question is whether "under all these circumstances it should be "permitted to members of the crew freely to "go ashore without taking some precautions

"that will be due under the circumstances of "the case to see that the men come back to "the ship. We have to take the case as we "find it. We are trying but one case. We "are not trying one thousand. We are not "trying to settle this question as to whether "sailors shall be allowed to go ashore at all; "whether they shall be kept on the ship in "port; but we are settling the question "whether he used due precautions to see to "it that when he allowed this man to land "he used the precautions for his return. "Whether it was prudent for him to let him "go ashore under the circumstances that he "did.

"Now, you have got the situation. The "first thing for you to determine is whether "a ship captain is using due precaution "when he has a general rule that any mem-"ber of his crew may go ashore upon obtain-"ing permission. Now, there is no evidence "here that the man did obtain permission "in this case, and the question is, if the rule "is that he must obtain permission, go be-"fore his superior and make the request, "whether that rule was enforced; whether "he had proper discipline on the ship, and "whether, as applied to this particular man, "there should have been something done that "was not done to put constraint upon him "to see to it that he did not go ashore and "to see to it that he returned to the ship "if he did go ashore.

"Now, what kind of precaution should be "used? The captain of this vessel has sole "and authoritative command. He is the "ruler of the ship. He is supposed to have "the necessary capacity to deal with the "questions that come to him and the obli-"gations that the law places upon him, and "it is his duty to exercise the care that any "good business man in that occupation "would exercise; take the precautions that "such a man would take, a good business "man, and see to it that men who are aliens "and part of his crew, if allowed to go

"ashore should be allowed to do so under "such rules, discipline and restraint as "would tend to bring them back to the ship. "Now if the captain has done that he has "done his whole duty, and that is the essen- "tial thing for you to grasp and say what "would a typical business man in that oc- "cupation have done under those circum- "stances."

XV.—That your petitioner is advised that the learned judge who presided at the Trial Court, recognizing the evident fact that seamen are obliged to go on shore on ship's duty, and that by general commercial usage they are also permitted to have shore leave when in port, construed the word 'landing', in section 18 of the Immigration Law of 1903, as applied to alien seamen, to mean not going on shore, but remaining on shore permanently, or finally severing their connection with the ship by desertion, and that under this construction of the statute the learned Judge held that the due precautions to be taken to prevent their "*landing*" were in effect due precautions to secure the return of a seaman who had gone ashore. And your petitioner is advised that no such meaning or construction can be given to the word 'landing' in said section as applied to the persons on said ship other than seamen or to alien passengers with reference to whom said law was especially passed and who constitute by far the greater number of the persons to whom in any view the statute applies and who must by the provisions of said Immigration Law be detained on the ship itself until landed at Ellis Island, the place appointed therefor, by the Immigration authorities.

XVI.—That your petitioner was found guilty by the jury, and was sentenced by the trial Court to pay a fine of $500, or to be imprisoned until the fine was paid in the Kings County Penitentiary.

That said sentence was stayed pending the review of said judgment of conviction by the Circuit Court of Appeals for the Second Circuit, and said sentence has not yet been executed.

XVII.—That a writ of error was allowed to review in the United States Circuit Court of Appeals for the Second Circuit, the record and proceedings in the action and the judgment entered therein.

XVIII.—That a motion was made in said Circuit Court of Appeals to advance the argument on the ground that the question whether the Immigration Act of 1903, applies to aliens who are *bona fide* seamen is one of great importance to commercial and shipping interests and affects the relations of the United States with foreign countries, and that said motion was granted.

XIX.—That on said writ of error said case was argued in the United States Circuit Court of Appeals for the Second Circuit on the 19th and 20th days of December, 1906, before Wallace, Lacombe and Townsend, Circuit Judges; that Judge Lacombe rendered an opinion in which Judge Townsend concurred, affirming the judgment of the Circuit Court, and that Judge Wallace handed down a dissenting opinion holding that the conviction of your Petitioner had proceeded upon a wrong interpretation of the Immigration Laws and that it should be reversed. That an order was thereafter on January 26, 1907, entered in the Circuit Court of Appeals for the Second Circuit, affirming said judgment of conviction against your petitioner.

XX.—That in the opinion of the said majority of the Circuit Court of Appeals, the construction

of said statute by the District Court as applied to seamen was distinctly approved as follows:

> "The Court instructed the jury that under "section 18 'if the captain of the ship does "not use due precaution to shut off oppor- "tunity for . . . desertion and landing; "due precaution to prevent the overt act "which the alien does, *then* he would fall "under the condemnation of the act.' Else- "where he instructed them: 'It is his duty to "exercise the care that any good business "man in that occupation would exercise; "take the precautions that such a man would "take . . . and see to it that men who "are aliens and part of his crew, if allowed "to go ashore should be allowed to do so "under such rules, discipline and restraint "as would tend to bring them back to the "ship. Now if the captain has done that "he has done his whole duty, and that is the "essential thing for you to grasp and say "what would a typical business man in that "occupation have done under those circum- "stances.' This seems to us an entirely fair "and reasonable construction of this section; "it gives force to all the clauses of its single "sentence, coupling the penal provisions "against *permitting* to land with the pro- "visions requiring the adoption of due pre- "cautions against such landing, and thus "making the test of offense committed not "the alien's mere landing but the failure to "adopt due precautions to prevent it. The "statute certainly was not intended to make "the owners, officers, and agents insurers "against the escape of every alien who might "be on board the vessel when she reached "this port, and the language used does not re- "quire so harsh a construction; the careful "and prudent man who can satisfy a jury "that he adopted precautions reasonably "adequate to prevent the landing need be "under no apprehension that he incurs a "penalty whenever an alien who has arrived "in his ship steps ashore.

The learned Judge who delivered a dissenting opinion, put his dissent on the ground that although the word "alien," in the 18th section of the Act, is "broad enough to include an alien seaman, it was not within the intention of Congress to include *bona fide* seamen within the term 'alien' as used in that section; and also that the construction given to the Act by the majority of the Court gave to the word 'landing' as applied to seamen 'a more liberal interpretation than is permitted by the language of the section,' as follows:

> "The majority opinion, in order to obviate "the hardship and inconvenience which "would result if alien seamen are included in "the statute, attempts to mitigate these con- "sequences by giving a more liberal interpre- "tation to the term 'landing' than is per- "mitted by the language of the section. The "opinion virtually declares that if seamen "are allowed to go ashore under such rules, "discipline and restraint as would tend to "bring them back to the ship, they are "not 'landed' within the meaning of the sec- "tion. According to the accepted meaning "the act of landing is 'setting on shore; "coming on shore.' Giving the language of "the section its ordinary meaning, it is none "the less an offense to land a sailor that he "has been landed under precautions which "will ensure his return to the ship. If "sailors are included in the statute, it seems "plain that they cannot be permitted to go "ashore by the officers or the owner of a "vessel, and any failure to take sufficient "precautions in that behalf is a violation of "the section. I cannot agree to such a lati- "tudinarian construction of the statute for "the purpose of eliminating its objectionable "features and fortifying the argument that "Congress intended to include sailors.
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"sailors, it intended to include the officers of
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"all the foreign steamships, as well as the
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"tion of the statute, and that it should there-
"fore be reversed."

XXI.—That in said opinion of the majority of the Court, it was held that the question whether or not your Petitioner had adopted due precaution to prevent the landing of said alien, had been passed upon by the jury and was not open for their consideration; and they based the conclusions at which they arrived wholly on the ground that the Immigration Law of 1903 applies to aliens who are *bona fide* seamen.

XXII.—That your Petitioner is informed and believes that a large number of indictments have been found in various judicial circuits against Masters for desertion of seamen; that trials on certain of said indictments have been adjourned pending a final determination of this case and that it is a matter of great importance to the commercial and shipping interests of the United States, and of foreign countries having commercial relations with the United States that the question whether the Immigration Law of 1903, applies to aliens who are *bona fide* seamen shall be passed upon by this Court.

XXIII.—That your Petitioner is informed by his counsel herein that an official representing the British Government has addressed his said counsel, requesting to be kept informed as to the pro-

gress of this case, and stating that it is considered by the officials of the British Government to be a case of great importance as affecting the interests of British Commerce with the United States.

XXIV.—That your Petitioner is advised that this case presents clearly and without complicating circumstances, the question whether or not the Immigration Act of 1903, applies to aliens who are *bona fide* seamen, and that the opinions rendered by the said Judges of the United States Circuit Court of Appeals have turned on that question of the construction of said statute and not on any special facts in the case, and that in the dissenting opinion filed by Judge Wallace, he did not find it necessary even to refer to the facts of the case, but devoted his discussion of the subject wholly to the interpretation of the Immigration Law of 1903.

XXV.—That your Petitioner is informed and believes that all but a very small proportion of the foreign commerce of the United States is carried on by means of vessels which are manned and officered by aliens, and that in many American vessels a large proportion of their crews are aliens and your Petitioner is advised that if the word "alien" as used in the 18th section of the Immigration Act of 1903 applies to *bona fide* seamen, that it will be impossible to conduct shipping and commercial business at the ports of the United States in the manner in which the same has heretofore been conducted for the reason that such interpretation of said section will prevent alien officers of the ship from going ashore to enter or clear the ship with the custom house officials, that it will prevent such alien officers from leaving the ship to communicate with agents or consignees; that it will prevent alien officers or

alien members of the crew from leaving the ship for the purpose of mooring the vessel or discharging or loading the vessel, or to purchase supplies, or for any other purpose on ship's duty or business.

XXVI.—That your Petitioner is advised that if the word "alien" as used in other sections of the Immigration Law of 1891 is given the same meaning as it has been declared to have in section 18 by the United States Circuit Court of Appeals, that it will become impossible to conduct shipping and commercial business in the ports of the United States in the manner in which the same has heretofore been conducted, because, among other things, it will require all alien officers and members of the crew to be treated in the same manner as though they were immigrants and will subject such officers and members of the crew to the provisions of law as provided in the case of immigrants including the provisions prohibiting the employment of aliens abroad to perform any service in the United States.

XXVII.—That your Petitioner is advised that in case the decision of the Circuit Court of Appeals is affirmed or stands as the settled law of the country, it must lead to great hardship, oppression and injustice to the officers and crew of foreign steamships and to foreign officers and seamen on American ships while in the ports of this country in that it will be necessary, in order to avoid liability under said section on the part of the master, that shore leave, which by usage of commerce has always been granted to alien officers and seamen while in the ports of this country, shall be practically denied to them, and they must be kept on board said ship under constant surveillance, to the great detriment and inconvenience of commerce, foreign and domestic; that such shore leave granted to seamen of

good behavior is an established usage of commerce, and as was proved in this case, is necessary to the proper conduct of commercial business. And as your petitioner is advised it was this necessity for giving sailors shore leave, and also the evident necessity of allowing seamen to go on shore on the ship's business while in port which necessarily constrained the Court to give to the word "landing," in the 18th section, a meaning which cannot be applied to it as regards aliens generally on a ship, that is, passengers. And your petitioner is advised that said statute being a penal statute should be strictly construed and cannot rightfully be construed as meaning one thing for an alien seaman and quite another thing for an alien passenger.

WHEREFORE your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals, for the Second Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated a full and complete transcript of the record of all proceedings of the said Circuit Court of Appeals in the said case in the said Court entitled, "William F. D. Taylor, plaintiff in error, against the United States, defendant in error," to the end that the said case may be reviewed and determined by this Court, as provided in Section 6 of the Act of Congress entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States and for other purposes," approved March 3, 1891, or that your petitioner may have such other and further relief and remedy in the premises as to this Court may seem proper and in conformity with the said Act; and that the said decision or judgment of the said Circuit Court of

Appeals affirming the judgment against your petitioner may be reviewed.

And your petitioner will ever pray.

WILLIAM F. D. TAYLOR,
Petitioner.

LORD, DAY & LORD,
Attorneys for Petitioner.

WILLIAM G. CHOATE,
LUCIUS H. BEERS,
Of Counsel.

STATE OF NEW YORK, }
County of New York } ss.:

WILLIAM F. D. TAYLOR being duly sworn, says:

I am the petitioner above named. The foregoing petition is true of my own knowledge except as to all the matters therein stated to be alleged upon information and belief and as to those matters I believe it to be true.

WILLIAM F. D. TAYLOR.

Sworn to before me this 6th }
day of February, 1907. }

CHARLES D. MILLER,
[SEAL.] Notary Public,
Suffolk County.

Certificate filed in New York County.

ADDENDUM.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Subsequent to the verification and docketing of the foregoing petition, counsel for the petitioner have been informed by the Department of Justice that the Government not only does not oppose the petition but that it concurs therein, as will appear by the letter of the Solicitor-General, of which the following is a copy:

"DEPARTMENT OF JUSTICE,
"WASHINGTON.

"FEBRUARY 19, 1907.

"LUCIUS H. BEERS, Esq.,
49 Wall Street,
New York, N. Y.

"SIR:

"Answering your letter of the 18th instant, in re-
"lation to the case of Taylor *v.* The United States,
"I beg to say that if you care to do so you are at
"liberty, when presenting the petition for certiorari
"to the court on Monday next, to state that not
"only does the Government not oppose the petition
"but that it concurs therein.

"In addition, if you desire, you may insert a page
"in your petition to the above effect.

"Respectfully,
"H. M. HOYT,
"Solicitor-General."

Respectfully submitted,
WILLIAM G. CHOATE,
LUCIUS H. BEERS,
Of Counsel for Petitioner.

Dated February 21, 1907.

Supreme Court, U. S.
FILED.
FEB 18 1907
JAMES H. McKENNEY,
CLERK.

238.

No. [redacted]

UNITED STATES SUPREME COURT.

WILLIAM F. D. TAYLOR,

Petitioner,

against

UNITED STATES,

Respondent.

BRIEF FOR PETITIONER.

WILLIAM G. CHOATE,
LUCIUS H. BEERS,
Of Counsel for Petitioner.

EVENING POST JOB PRINTING OFFICE, NEW YORK.

Supreme Court of the United States.

WILLIAM F. D. TAYLOR, Petitioner, vs. UNITED STATES, Respondent.	October Term, 1906.

Brief for Petitioner on Application for Writ of Certiorari.

This is an application for a writ of certiorari to require the Circuit Court of Appeals for the Second Circuit to certify to this Court for its review the case of William F. D. Taylor, Plaintiff in Error, against United States, Defendant in Error.

Facts.

The Petitioner is a captain who has followed the sea for forty-one years and has been in the service of the Cunard Steamship Company for over twenty years (pp. 25 and 28 Record). He was indicted in the Southern District of New York under Section 18 of the Immigration Act of 1903 on the ground that while captain of the steamship *"Slavonia"* he had brought on said vessel from a foreign country to the Port of New York one Elias Ramadonowich, an alien, and that without adopting due precautions

to prevent the landing of such alien he did "un-"lawfully and wilfully land or permit to land in the "said district said alien at a place other than "that designated by the immigration officers" (pp. 7 and 8).

The Petitioner was tried beore the Hon. Edward B. Thomas, District Judge, and a jury in the United States Circuit Court for the Southern District of New York (p. 9).

On the trial it appeared by the evidence offered by the Government that the alien Elias Ramadonowich was a *bona fide* member of the crew of the steamship "*Slavonia*" (pp. 16 and 17); that he had duly shipped as a cook on the "*Slavonia*" at Fiume for the round voyage to New York and back to Fiume (p. 16); that he had previously been a member of the crew of an Austrian ship (p. 16); that he was not paid off in New York (p. 16); that at the close of his day's work on the first day when the ship was in the Port of New York he went ashore to take a walk (p. 15); that when he so left the ship to go ashore he intended to return to the ship, but after he was in the City he decided not to return and deserted (p. 18).

It was proved on behalf of the petitioner, without contradiction, that it is the uniform custom in the Port of New York to give reasonable shore leave to members of crews when not on duty (pp. 20 and 21), that the petitioner had adopted rules for the regulation of the crew of the "*Slavonia*" which permitted a portion of the crew when off duty to have shore leave if their conduct had been good and on their obtaining the permission of the head of their department (pp. 29 and 30).

It was further proved, without contradiction, that Elias Ramadonowich was to be paid off in Fiume at the termination of the return voyage; that his conduct had not been such as to suggest any intention to desert (p. 27), and that the only breach

of rules involved in his going ashore to take a walk as he did, was that he did not obtain the permission of the head of his department, although there was no evidence that he was not entitled to such permission.

It was also proved without contradiction that on this voyage of the "*Slavonia*," every member of the crew was asked by Captain Taylor's order if he desired to be paid off in New York, and if so he was required to pass through the examinations at the immigration station on Ellis Island and then be paid off (pp. 26 and 27). It was also proved without contradiction that before this crew was shipped at Fiume every man was examined by the ship's doctor and the Hungarian Emigration doctor, and that only those who were physically fit, with no disease of any nature so far as they could ascertain, were signed on (p. 26).

There was no evidence or suggestion offered by the Government that Elias Ramadonowich was not a bona fide member of the crew, or that he shipped for the purpose of evading any provisions of the Immigration Law, and there was no evidence or suggestion that the petitioner, or any one connected with the "*Slavonia*" or the Cunard Company had in any way directly or indirectly sought to bring to the United States either Elias Ramadonowich or any other alien in such a way as to evade the Immigration Laws.

This case is a typical case of the desertion of a *bona fide* seaman at a foreign port, and, as will appear from an examination of the rulings and charge of the Trial Judge and the opinions of the Judges of the Circuit Court of Appeals, this case turns on the question whether or not the 18th Section of the Immigration Act applies to *bona fide* seamen.

The petitioner was found guilty by the jury and was sentenced to pay a fine of $500, or to be im-

prisoned in the Kings County Penitentiary until the fine is paid (p. 47).

On writ of error the judgment of the Circuit Court was reviewed by the United States Circuit Court of Appeals, for the Second Circuit. Judge Lacombe handed down an opinion, in which Judge Townsend concurred, for the affirmance of the judgment below, and Judge Wallace handed down a dissenting opinion for reversal.

An examination of these opinions will show that all the Judges held that the question whether or not due precautions had been adopted had been passed upon by the jury and were not open for their review, and the case turned entirely on the construction of the Immigration Act of 1903.

POINT I.

The question here involved is so important as to merit the consideration of this court.

It is well known that the foreign commerce of the United States is carried on by vessels which are practically all manned and officered by aliens.

This is a fixed condition affecting our foreign commerce, and if, as held by the Circuit Court of Appeals, Section 18 of the Immigration Act applies to *bona fide* seamen, then every time a desertion occurs the master and the ship owner, and his agent, are exposed to a harassing trial and a degrading punishment.

But it was proved in this case that it is impossible to prevent all desertions by any precautions whatever, and the representative of the Cunard Company in the United States, who has had a life long experience in the shipping business in Boston

and New York (pp. 18 and 20), testified with respect to the crews of that line,—the oldest passenger line doing business with America:

> "It is very rarely, if ever, we have a steam-
> "er arrive at this port where one or more
> "members of the crew are not eventually put
> "down as deserters—that is not only the
> "case with all Cunard ships, but with all for-
> "eign steamships that come into this port, as
> "far as my general knowledge goes" (p. 20).

If the decision of the Circuit Court of Appeals is to be the final interpretation of the Immigration Act, then ship masters and ship owners and agents who conduct our foreign commerce are compelled to run the risk of a fine of $1,000, or imprisonment for a year, or both, when any one of these *unpreventable* desertions occur.

It cannot be said in reply to this that the law will only be enforced where there has been a grave neglect of precaution, for if this Court should be disposed to examine the record below on this question of precautions it will find that precautions were taken, and that if a much more elaborate system of precautions had been adopted on the *"Slavonia"* they would have been ineffectual to prevent this desertion. In this case, a man, who had no known motive to desert, who had a good record on the ship, and who would have been entitled to shore leave under any just system, went ashore for a walk when off duty. At the time he went for his walk, his wages had not been paid and he *intended to return to the ship.* As he himself testified for the Government (p. 18), when called as a witness, the intention to desert arose in his mind after he was somewhere on the shore and beyond the jurisdiction of the officers of the ship, and obviously beyond the reach of any precautions which they could possibly have adopted.

If, under such circumstances, a man who occu-

pies the responsible and honorable position of captain of a large passenger ship may be heavily fined, or imprisoned, or both, it cannot be safe to prophesy that this Section of the Immigration Law will not be enforced except in aggravated cases of neglect of precautions.

The decision here sought to be reviewed is final in its nature. Neither the petitioner nor any other person interested, or to become interested, in the question can have any relief from the effects of that decision unless this Court consents to review the case.

POINT II.

The question presented by this case is a new one and affects the interest of the public.

The question in this case is whether the existing Immigration Law requires seamen to be treated as immigrants, and the decision below is of great importance, both as affecting the administration of the Immigration Law and as affecting the commercial and shipping interests which are thus brought within the provisions of that law.

The question presented is essentially a public question. It arises in a criminal proceeding, which must have been instituted on the theory that the public interest required that a misdemeanor be punished if one had been committed. But this alleged misdemeanor is new to our law and if it is a misdemeanor, then it has been proved that under existing conditions it is one which must be committed almost daily in the ports of the United States. And if the decision of the Circuit Court of Appeals is to

be the final authority on this subject, and if this law is to be enforced, then obviously there must be such a succession of prosecutions under it as will require the Federal Courts to devote a considerable portion of their time to the enforcement of this single Section of the Immigration Act.

POINT III.

A grave question of international law affecting the relations between the United States and foreign countries is here involved.

There is an element of reciprocity in the treatment accorded by commercial nations to the seamen of other countries. The United States is not the only country which has statutes regulating the admission of aliens, and there is every reason to suppose that foreign countries will not permanently give our seamen better treatment than we give to theirs.

The fact referred to in the petition that the officials of the British Government are carefully watching this case in view of its effect on British interests, shows that they consider that the method of conducting commerce between the United States and Great Britain will be seriously affected by the determination of this case.

The conditions which cause our foreign commerce to be handled largely by aliens are conditions which deeply affect our international relations, and if Congress has adopted an Immigration law which imposes intolerable risks on alien officers and seamen who carry the passengers and merchandise, that fact cannot fail to affect our international relations, as well as our foreign commerce.

POINT IV.

The fact that Judge Wallace filed a dissenting opinion and the grounds on which that opinion is based show the necessity of having this case reviewed.

The fact that Judge Wallace felt it necessary to dissent so emphatically from the opinion expressed by the other two Judges and to state his position at such length shows that he considered it was a grave error for the Circuit Court of Appeals to affirm the conviction.

An examination of the two opinions will show that the views of the majority invite the dissent expressed by Judge Wallace—the majority opinion states "the offence is failure to provide due precau-"tions against landing. It could not be held that "there was any such failure where a trusted and ap-"parently trustworthy officer or seaman was thus "engaged temporarily on shore about the ship's "business." But the statute (Section 18) after providing that it shall be the duty of owners, officers and agents to adopt due precautions to prevent the landing of an alien at an improper place proceeds to expressly designate the offense which is to be punished thus:

> "And any such owner, officer, agent or "person in charge of such vessel who shall "land or permit to land any alien at any "time or place other than that designated by "the immigration officers shall be deemed "guilty of a misdemeanor."

Thus in order to sustain the conviction without giving to Section 18 what all the Judges admit would be an unreasonable construction, the majority hold that the word "landing" is used not in

its common and ordinary sense of "going ashore," but in an unusual sense of finally severing connection with the ship by desertion peculiarly applicable to seamen alone, and in a different sense from which it is used as applied to passengers.

Obviously a captain cannot permit an alien passenger to land whether the passenger is trustworthy or untrustworthy, and whether the business of the passenger on shore is temporary or permanent. But the majority of the Judges of the Circuit Court of Appeals have held that there is not a breach of the statute where an apparently trustworthy seaman is allowed to go ashore temporarily about the ship's business.

The Trial Judge had charged the jury that a captain would have done his whole duty under this statute if he should "see to it that men who were aliens and part of his crew, if allowed to go ashore, should be allowed to do so under such rules, discipline and restraint as would tend to bring them back to the ship."

This construction of the statute, the majority of the Judges of the Circuit Court of Appeals characterized as "an entirely fair and reasonable construction of this section."

But this construction gives to the word "landing" a meaning which it obviously cannot have when applied to alien passengers.

In other words, in a criminal proceeding, the conviction of this petitioner has been upheld by giving to the word "landing" in the statute a meaning which is not its ordinary meaning, and a meaning which it does not have when applied to the class of persons whose entry into the United States is particularly sought to be regulated by this statute.

This decision of the majority invites the dissent which Judge Wallace expresses as follows:

> "The majority opinion, in order to obviate
> "the hardship and inconvenience which

"would result if alien seamen are included "in the statute, attempts to mitigate these "consequences by giving a more liberal in- "terpretation to the term 'landing' than is "permitted by the language of the section. "The opinion virtually declares that if sea- "men are allowed to go ashore under such "rules, discipline and restraint as would "tend to bring them back to the ship, they "are not 'landed' within the meaning of the "section. According to the accepted mean- "ing the act of landing is 'setting on shore; "coming on shore.' Giving the language of "the section its ordinary meaning, it is none "the less an offense to land a sailor that he "has been landed under precautions which "will ensure his return to the ship. If "sailors are included in the statute, it seems "plain that they cannot be permitted to go "ashore by the officers or the owner of a "vessel, and any failure to take sufficient "precautions in that behalf is a violation of "the section. I cannot agree to such a lati- "tudinarian construction of the statute for "the purpose of eliminating its objectionable "features and fortifying the argument that "Congress intended to include sailors.

"Congress either intended to include "sailors, under the general term of aliens, "or it did not. The majority opinion is "based merely on the employment by Con- "gress of the broad term. If Congress by "the use of this term intended to include "sailors, it intended to include the officers of "the ship; and the commanders of nearly all "the foreign steamships, as well as the "officers of foreign naval vessels upon a "visit here would be included in the term."

Again, the petitioner argued below that the United States immigration statutes as they existed prior to the adoption of the Act of 1903 did not apply to *bona fide* seamen, and that contention was not controverted in the briefs of counsel or in any views expressed by any of the Judges below. The

question to be determined was, therefore, whether in passing the Act of 1903 Congress had intended to make so serious a change in the immigration laws as to extend them to seamen.

In passing on this question it was first necessary for the Court to decide whether the words "any alien," as used in Section 18, included an alien seaman, and in discussing that question the petitioner had pointed out to the Court that the word "alien" was used in many sections of the Immigration Act of 1903 in such a sense as would make it quite inapplicable to seamen, as, for example, where the statute required lists of all aliens coming by the ship to be delivered to the immigration authorities and required certain statements to be made as to the ticket, family, destination, etc., of such aliens.

The majority of the Judges held with respect to the meaning of the word aliens as used in other sections of the act:

> "When a vessel brings to this country "aliens who, by coming aboard as passen- "gers under no contract to return, have ad- "vised the Captain that upon arrival they "expect to leave the ship permanently and "disappear into the general body of the pop- "ulation, he must take the steps to assist "the immigration officers which these sec- "tions require; but where he is not thus ad- "vised, as in the case of a seaman of his crew "who has signed articles for return voyage, "he will discharge his full duty if he adopts "due precautions to prevent that alien from "effecting a landing which will defeat the "objects of the statute by enabling him to "become a part of the national population "without having first been passed by the ex- "amining officers."

This is merely saying in another way that the word "alien" as used in Section 18 has a different meaning from the word alien as used in other sec-

tions of the same Act, and that it must be given this different meaning in Section 18 from that which it has in the other sections in order to uphold the conviction and punishment of the petitioner. This conclusion of the majority invited the dissent of Judge Wallace, which he expressed by holding that Section 18

> "Is to be read with all the provisions of the "act *in pari materia*. This is not only a gen- "eral rule of statutory interpretation, but it "is one which is especially applicable to a "general code or statutory revision. As to "these the rule of construction is that the en- "actment is intended to form one system of "statutory laws contemporaneous in time, "and all the sections dealing with the same "subject matter are to be construed as one "statute. The accepted canons of interpre- "tation of all statutes require every part of "the act to be taken into view for the pur- "pose of ascertaining the legislative intent, "restrict general expressions whenever neces- "sary to make all the parts harmonize and "give an intelligible effect to each and limit "the application of general terms so as not to "lead to injustice or an absurd conclusion."

Without attempting here to argue in support of the views expressed by Judge Wallace, the mere statement of those views as contrasted with the opinion of the majority of the Court shows that the questions merit the attention of this Court before the law on this subject is to be considered settled.

POINT V.

The argument for the petitioner in the courts below.

A.

TO SUSTAIN THE CONVICTION OF THE PETITIONER A SPECIAL AND UNUSUAL MEANING HAS BEEN GIVEN TO THE WORD "LANDING" AS USED IN THE STATUTE.

Attention has already been invited to the special and unusual meaning which the majority of the Judges of the Circuit Court of Appeals found it necessary to give to the word "landing" in order to sustain their decision that Section 18 of the Immigration Act was intended to apply to seamen.

The interpretation put upon the statute by the majority of the Judges of the Circuit Court of Appeals violates the first and most essential rule for the construction of penal statutes. That this statute is a highly penal statute will not be denied. In the case of *Hackfield* v. *U. S.*, (197 U. S., 442,) this Court held that the corresponding Section 10 of the Immigration Law of 1891 was a highly penal statute, citing the case of *U. S.* v. *Wiltberger*, (5 Wheat., 76, 95,) quoting the language of Chief Justice Marshall as follows:

> "The rule that penal laws are to be con-
> "strued strictly, is perhaps not much less
> "old than construction itself. It is founded
> "on the tenderness of the law for the rights
> "of individuals; and on the plain principle
> "that the power of punishment is vested in
> "the legislative, not in the judicial depart-
> "ment. It is the Legislature, not the Court,
> "which is to define a crime, and ordain its
> "punishment."

This rule for the strict construction of a penal statute at least requires that the language used

should be taken if possible in its common and ordinary sense, and it is utterly inconsistent with the rule that a penal statute should be construed to mean one thing in defining the offense for one defendant and quite another thing for another defendant. Such construction giving different meanings to the words used as applied to different persons accused of violating the statute would be an extraordinarily latitudinarian construction, and as far as possible from a strict construction. This is exactly the method adopted by the Court below in the construction of the word "*landing*" in this statute, making it mean one thing as applied to seamen and another thing as applied to passengers. The purpose of giving this different construction to the act in the case of seamen was in order to find a purpose or intention of Congress to include seamen within the terms of the act.

There can be but one definition of the crime declared by Congress in a penal statute and it must be uniform, and to distort its meaning from this common and obvious sense and from the sense in which it is obviously applicable to most parties charged with the offence in order to include parties who are not guilty within that meaning of the statute is in the language of the Court in *United States* v. *Wiltberger* (*supra*) the exercise of the power of punishment not by the legislative, but by the judicial department of the government.

This objection is, therefore, fatal to the construction put upon the act below upon which the conviction of the petitioner rests without regard to a critical examination of the Immigration Law of 1903 or the history of that enactment. But it is confidently believed that the examination of that entire statute and the acts *in pari materia*, and the history of the enactment will satisfy the Court that

bona fide seamen were not included within the terms of Section 18.

Taking up, then, the other considerations which could properly affect the decision of this case, the petitioner contended that—

B.

THE GENERAL PURPOSE OF THE ACT OF 1903 AS A WHOLE, AND OF SECTION 18 IN PARTICULAR, IS NOT IN HARMONY WITH THE APPLICATION OF THE STATUTE TO THE DESERTION OF BONA FIDE SEAMEN.

The argument under this contention was based on the views expressed by this Court in *Holy Trinity Church* v. *United States* (143 U. S., 457), and following those views it was pointed out that the Act of 1903, as appeared by this title and its provisions, was intended as a whole to regulate the admission of immigrants, but not to regulate the temporary landings or desertions of *bona fide* seamen.

C.

THE WORD "ALIENS," AS USED IN IMMIGRATION STATUTES EXISTING PRIOR TO 1903, DID NOT APPLY TO ALIENS WHO WERE BONA FIDE MEMBERS OF A CREW.

This proposition was not disputed in the brief filed by the Government or in the opinion of the majority of the Judges of the Circuit Court of Appeals.

The present inquiry was thus narrowed down to the question whether or not Congress intended in passing the Act of 1903 to make so drastic a change in the law, as to make it apply to *bona fide* seamen, and, to resolve this last question the petitioner

called attention to the phraseology adopted in the Act of 1903 and to the Congressional history of the Act.

In discussing the earlier immigration cases referred to by the petitioner, the attention of the Court was invited to two rules which had been laid down by the United States courts in immigration cases. First, the rule referred to by this Court in *Holy Trinity Church* v. *United States*—that "It is a familiar rule that a thing may "be within the letter of the statute and yet "not within the statute, because not within its spirit, nor within the intention of its makers"—and, second, the rule laid down both in *U. S.* v. *Burke* (99 Fed. Rep., 895) and in *Moffitt* v. *U. S.* (128 Fed. Rep., 375) to the effect that immigration statutes "should be construed as a whole and not by "selecting particular words or sentences and inter-"preting them according to their strict letter."

Taking up, then, first the phraseology of the Act of 1903, the petitioner claimed that

D.

THE USE OF THE WORD "ALIEN" IN THE ACT OF 1903 IN PLACE OF THE WORDS "ALIEN IMMIGRANT" AS OCCURRING IN PREVIOUS STATUTES, DOES NOT INDICATE ANY INTENTION ON THE PART OF CONGRESS TO MAKE THE STATUTE OF 1903 APPLY TO ALIENS WHO ARE BONA FIDE SEAMEN.

The Act of 1903 was a codification of earlier statutes on the subject of immigration. Those earlier statutes, in designating the persons whose admission was to be regulated, designated them as "immigrants" or "alien immigrants," using those words as many as fourteen times. But in this codification of 1903 the word "immigrant" is never used as a noun or as defining the class of persons

whose admission is regulated. The word used in the Act of 1903 to designate individuals of that class is the word "alien."

The obvious purpose of this change was to enable ship's officers and immigration officers to require the inspection of all who were alien passengers, even though the officers were not able to prove that such passengers were, in fact, intending to become immigrants. An alien passenger is not an immigrant unless he intends to immigrate, but intention is a matter resting in the mind of the passenger, and, therefore, the officer would not be able to prove it if the passenger wished to deceive him.

On the other hand, the provisions of the Act of 1903, taken as a whole, indicate that it was intended to regulate the admission of alien passengers and not the temporary landing or desertion of *bona fide* seamen, and, under the authorities relating to the effect of codifications, the Act of 1903 cannot be construed as making so radical a change in the law in the absence of any express language to that effect.

Pursuing then the study of the Act of 1903, according to the rules already referred to, the petitioner called to the attention of the Court that—

E.

THE USE OF THE WORD "ALIEN" ELSEWHERE IN THE ACT OF 1903 INDICATES THAT AS IT IS USED IN SECTION 18 IT DOES NOT INCLUDE BONA FIDE SEAMEN.

This is an important factor in determining the intention of Congress, for, considering the rules of construction already referred to, Congress cannot have been at the pains to adopt the word "alien" throughout this codification to designate the persons whose admission was to be regulated and yet

have used the word so carelessly as to require it to be given one meaning in one section and a different meaning in other sections.

Following, then, the word "alien" through the Act, it will be seen that it is used in such a sense as would involve injustice and absurdity if, in adopting the word, Congress had intended to include *bona fide* seamen.

Some of the absurdities have been noticed by Judge Wallace in his opinion. They occur in almost every one of the first twenty sections of the Act. A fair sample is the following—

Section 4 of the Act provides as follows:

> "That it shall be unlawful for any person, "company, partnership, or corporation, in "any manner whatsoever, to prepay the "transportation or in any way to assist or "encourage the importation or migration of "any alien into the United States, in pursu- "ance of any offer, solicitation, promise, or "agreement, parole or special, expressed or "implied, made previous to the importation "of such alien to perform labor or service of "any kind, skilled or unskilled, in the United "States."

And Section 5 provides that for every case where an alien is so encouraged or solicited to come and labor here, the offending company shall forfeit $1,000.

Now, it is a well known fact that almost all of the crews of vessels engaged in foreign commerce are aliens, and have been employed abroad under express contracts which, among other things, require them to perform service during the time the vessel is in the United States. And, there are practically at all times some thousands of alien seamen actually at work in our principal ports, all of whom have been employed abroad for that particular purpose.

It cannot have been the intention of Congress to prevent this, because to prevent this would be practically to prevent foreign commerce, and a person laboring on the enclosed waters of the United States is as truly within the United States, in contemplation of law, as though he were laboring on land.

Obviously, Congress cannot have intended to make this contract labor clause apply to *bona fide* seamen. But, if the decision of the Circuit Court of Appeals is right, this contract labor clause must apply to them unless the word "alien" means one thing in one section and a different thing in another, and this is an impossible conclusion under the rules of construction which have been laid down with respect to immigration statutes.

F.

THE CONGRESSIONAL HISTORY OF THE IMMIGRATION ACT OF 1903 SHOWS THAT IN PASSING THAT ACT CONGRESS DID NOT INTEND THAT IT SHOULD APPLY TO ALIENS WHO WERE BONA FIDE SEAMEN.

Both the counsel for petitioner and the counsel for the Government made an exhaustive study of the Congressional history of the Act of 1903, and stated the results of that study, at considerable length, in the briefs which were filed for the petitioner and for the Government in the Circuit Court of Appeals, giving references to the Congressional Record and Congressional documents.

Neither counsel found any statement anywhere in the Congressional history of the act to the effect that Congress intended to extend the immigration laws to seamen.

This is most significant in view of the fact that the law as previously existing had been declared not to apply to seamen, and, in view also of the fact that the Act of 1903 was adopted after full explana-

tion of the bill and long debate both in the Senate and House of Representatives.

The decision of the Circuit Court of Appeals must, therefore, rest in part on the proposition that Congress, which discussed this subject so fully, intended to make this startling change in the law, but that nobody in either the Senate or the House said anything about it.

G.

THE CONDITIONS SURROUNDING THE EMPLOYMENT, DISCHARGE OR DESERTION OF SAILORS ARE SUCH THAT CONGRESS CANNOT HAVE INTENDED THAT SECTION 18 SHOULD APPLY TO DESERTIONS.

Sailors are recognized by the law as a roving and somewhat irresponsible class who require, among other things, special laws to keep them from violating their contracts and deserting. That fact is recognized by a series of United States statutes dealing with the subject of desertion, and by such foreign statutes as the British Merchant Shipping Act of 1894 (57 and 58 Vict., Ch. 60, Sections 220-224).

The claim of the Government in this case has been in substances, that these deserters must now be dealt with by an entirely different set of laws; that is, the laws relating to immigrants, and that when a seaman deserts, the master becomes liable to a fine or imprisonment, or both, because the *master* has violated this Section 18.

Now, the desertion of a seaman is primarily an offense against the master, because he cannot take charge of the ship, either in port or at sea, without the services of a crew, and the claim of the Government in this case involves the claim that Congress intended that the master should be punished by fine and imprisonment because a seaman has injured him and violated his contract.

H.

THE INTERPRETATION OF SECTION 18 BY THE COURT BELOW MAKES AN ACT CRIMINAL WHICH WAS NOT CRIMINAL WHEN PERFORMED.

While this Section 18 is not, in the technical sense an *ex post facto* law, the interpretation placed on the section by the Circuit Court of Appeals is open to the same moral objection which exists in the case of *ex post facto* laws.

Unless it is illegal to give sailors shore leave, then Elias Ramadonowich, the alien seaman in this case, was entirely within his rights and within the law when he went down the gangway of the "*Slavonia*" to take a walk. His record was good, his pay had been held back, and he testifies himself that he intended to return to the ship. Capt. Taylor had no just reason for keeping him on board, and, so far as any express or implied permission from Capt. Taylor enabled him to go down the gang plank and take a walk, that express or implied permission of the Captain was entirely legal, and if Elias Ramadonowich had returned to the ship, as he intended to return, Capt. Taylor could not have been indicted.

But, after this seaman was somewhere in the City of New York he changed his mind and deserted, and the act of Capt. Taylor in allowing him to go down the gang plank, which was legal when it took place, was afterward made a criminal act by something which happened afterward, and after the seaman was out of the Captain's jurisdiction.

POINT VI.

The danger that persons who are in fact immigrants may ship as members of a crew and so obtain admission to the country has nothing to do with this case.

It has already been held, if it ever needed to be so held, that the Courts will deal with any mere subterfuge by which a man, who is, in fact, an immigrant, may attempt to masquerade as a seaman. Under previous immigration acts, persons whose enrollment in the crew had been a mere colorable act or device to obtain admission into the country were treated as immigrants, and they would have to be treated as immigrants under this act.

But this case does not involve the case of a counterfeit seaman but the case of a real seaman. The status of Elias Ramadonowich as a *bona fide* seaman has not been questioned in this case, and there has not been so much as a suggestion to the effect that this petitioner, or any other officer of the *"Slavonia,"* or of the Cunard Company, was in any way concerned in any device for bringing Elias Ramadonowich, or any other alien, to the United States in violation of the immigration laws.

POINT VII.

A writ of certiorari should issue to the Circuit Court of Appeals for the Second Circuit to certify to this court for its review and determination the case of William F. D. Taylor, Plaintiff in Error, against the United States, Defendant in Error.

WILLIAM G. CHOATE,
LUCIUS H. BEERS,
Of Counsel for Petitioner.

Office Supreme Court, U. S.
FILED.
MAR 23 1907
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1906.

No. [redacted]238.

WILLIAM F. D. TAYLOR,
Plaintiff in Error,

against

UNITED STATES,
Defendant in Error.

MOTION TO ADVANCE.

WILLIAM G. CHOATE,
LUCIUS H. BEERS,
Of Counsel for Plaintiff in Error.

EVENING POST JOB PRINTING OFFICE, NEW YORK.

In the Supreme Court of the United States. 1

WILLIAM F. D. TAYLOR, Plaintiff in Error, AGAINST THE UNITED STATES, Defendant in Error.	October Term, 1906. No. 616.

Comes now the plaintiff in error by Lucius H. Beers, his counsel, and moves this Court to advance for hearing, on the Calendar of this court, the above 2
cause upon the facts and grounds set forth in the annexed affidavit of said Lucius H. Beers.

LUCIUS H. BEERS,
Counsel for Plaintiff in Error.

To HON. HENRY M. HOYT,
Solicitor General of the United States:

Please take notice that on the 25th day of March, 1907, the foregoing motion will be submitted to the 3
Supreme Court of the United States for the decision of the Court thereon.

Dated March 20, 1907.

LUCIUS H. BEERS,
Counsel for Plaintiff in Error.

4 IN THE SUPREME COURT OF THE UNITED STATES.

WILLIAM F. D. TAYLOR, Plaintiff in Error, AGAINST THE UNITED STATES, Defendant in Error.	October Term, 1906. No. 616.

5 STATE OF NEW YORK, County of New York, Southern District of New York, } ss.:

LUCIUS H. BEERS, being duly sworn, says: I am one of the counsel for the plaintiff in error in the above entitled cause, which is in this court upon a writ of *certiorari*, granted March 6, 1907, directed to the Circuit Court of Appeals for the Second Circuit. The return to said writ was filed in the office of the Clerk of this Court on March 9, 1907.

The plaintiff in error, who is the captain of the steamship *Slavonia* of the Cunard Line, was convicted in a criminal trial before District Judge Edward B. Thomas, sitting in the United States
6 Circuit Court for the Southern District of New York, upon an indictment, charging him with a violation of Section 18 of the Immigration Act of 1903, in that he failed to adopt due precaution to prevent the landing of an alien, who was a *bona fide* member of the crew of his steamship, at a point other than one designated by the immigration officers, and the plaintiff in error was sentenced to pay a fine of $500, or to be imprisoned until the fine was paid in the Kings County Penitentiary. Said sentence has been stayed, pending

the review of the judgment of conviction, and has 7
not yet been executed.

A writ of error was allowed to review said judgment in the United States Circuit Court of Appeals for the Second Circuit. A motion was made to advance the argument in that Court of Appeals upon the ground that the question, whether the Immigration Act of 1903 applied to aliens who were *bona fide* seamen, was one of great importance to commercial and shipping interests, and affected the relations of the United States with foreign countries, and said motion was granted. Said judgment of conviction was affirmed by the Circuit Court of Appeals, by a divided Court, upon the ground that the Immigration Law of 1903 applies to aliens who are 8
bona fide seamen.

The Immigration Act of 1907 has not altered the provisions formerly contained in Section 18 of the Immigration Act of 1903 in such a way as to make the said decision of the Circuit Court of Appeals in this case inapplicable to future cases of desertion of seamen.

A large number of indictments in various judicial circuits have been found against the owners and masters of steamships for desertion of seamen under Section 18 of the Immigration Law of 1903. The trials on some of said indictments have been adjourned pending the final determination of this case, which will be the first case involving 9
this question to come before this Court for review. Other cases under said section are being pressed for trial. Deponent believes that it is of great importance to the commercial and shipping interests of the United States and of foreign countries having commercial relations with the United States, that the question whether the Immigration Law of 1903 is applicable to aliens who are *bona fide* seamen should be passed upon by this Court at

as early a day as the other engagements of this Court will permit.

Deponent has been informed by the Solicitor General of the United States that the Government is in favor of having this cause advanced for hearing by this Court.

LUCIUS H. BEERS.

Sworn to before me this 20th day of March, 1907.

CHARLES D. MILLER,
[SEAL.] Notary Public,
Suffolk County,
Certificate filed in New York County.

SUPREME COURT OF THE UNITED ST

OCTOBER TERM, 1907.

No. 243.

WILLIAM F. D. TAYLOR,

Appellant,

vs.

UNITED STATES.

Brief for Petitioner.

INDEX.

PAGE.

STATEMENT OF FACTS 1

and hereunder:

The Statute. 1
The Indictment 2
The deserter was a *bona fide* seaman 3
Alleged Landing was an Ordinary Desertion. 3
Desertion unpreventable 4
Shore leave 5
Petitioner's precautions to diminish desertions 7
Interpretation of Immigration Act by Bureau of Immigration 9

SPECIFICATION OF ERRORS..... 11

FIRST POINT:

To sustain conviction the word "landing" must be given a special and unusual meaning 15

SECOND POINT:

A consideration of the Act of 1903 shows that it was not intended to apply to seamen 28

and hereunder:

Sub-division A: PAGE

General purpose of the statute not in harmony with such an application 28

Sub-division B:

Use of word alien throughout Act indicates that it was not intended to include seamen 34

Sub-division C:

Change of phraseology from former statutes indicates intention of Congress to make Act of 1903 apply to all alien passengers, but not to seamen 44

Sub-division D:

Congressional history of Act of 1903 shows that Congress did not intend to apply to seamen 52

Sub-division E:

Hardship to commerce 62

THIRD POINT:

Application of the Act to seamen involves attributing to Congress intention to hold shipmaster responsible for failing to prevent the unavoidable 63

and hereunder: PAGE

Impossibility of preventing desertions 64
Desertion in United States Navy 64
Shipmaster is the immediate sufferer from the desertion 66

FOURTH POINT:

The existence of a number of Federal statutes regulating the affairs of seamen shows that if Congress had intended the Immigration Law to apply to seamen it would have used language to that effect 68

and hereunder:

Statutes relating to seamen 68
Unnecessary to deport a *bona fide* seaman 69
Interpretation of word "seaman" 70

FIFTH POINT:

The application of the Immigration Law to deserting British seamen would prevent the enforcement of treaty obligations with Great Britain 72

SIXTH POINT:

The interpretation of the statute by the Court below makes an act criminal which was not criminal when performed 75

SEVENTH POINT: PAGE

The Immigration Bureau has not construed the Act of 1903 as applying to alien seamen 77

and hereunder:

The Act of 1907 81
Appendix 83

Supreme Court of the United States.

October Term, 1907.

No. 238.

William F. D. Taylor,
Petitioner,

against

United States.

Brief for Petitioner.

Statement of Facts.

This case comes to this Court on a writ of certiorari from this Court to review a judgment of the United States Circuit Court of Appeals for the second Judicial Circuit affirming a judgment of the United States Circuit Court for the Southern District of New York, entered herein May 21, 1906, on the verdict of "guilty" against the petitioner after a trial before Honorable Edward B. Thomas, District Judge, and a jury, on an indictment for a misdemeanor under Section 18 of the Immigration Act of 1903.

The Statute.

The petitioner was the Captain of the Cunard Steamship *Slavonia*. Section 18 of the Immigra-

tion Act of 1903, under which he was indicted, provides:

> "That it shall be the duty of the owners, "officers and agents of any vessel bringing an "alien to the United States to adopt due pre- "cautions to prevent the landing of any such "alien from such vessel at any time or place "other than that designated by the immigra- "tion officers, and any such owner, officer, "agent, or person in charge of such vessel "who shall land or permit to land any alien "at any time or place other than that desig- "nated by the immigration officers, shall be "deemed guilty of a misdemeanor, and shall "on conviction be punished by a fine for each "alien so permitted to land of not less than "one hundred or more than one thousand "dollars, or by imprisonment for a term not "exceeding one year, or by both such fine and "imprisonment, * * *."

The Crime as Charged in the Indictment.

The indictment alleges that Captain Taylor was Master of the *Slavonia;* that he brought on said vessel from a foreign country to the Port of New York one Elias Ramadonawich, an alien, and charges that "without adopting due precautions to "prevent the landing from the same of the said "alien, as provided by law, then and there did un- "lawfully and wilfully land, or permit to land, in "said district said alien at a place other than that "designated by the immigration officers, at said "port; that is to say, at the pier of said steamship "instead of at the Immigration Station at Ellis "Island" (p. 4).

FACTS.

The Alien was a bona fide Seaman.

Elias Ramadonawich shipped as a member of the crew of the steamship *Slavonia* at Fiume, Hungary (p. 10). He was an alien (p. 8). He had previously been a member of the crew of an Austrian ship (p. 10), and when he signed the articles of the *Slavonia*, he showed his previous shipping papers (p. 9). He shipped on the *Slavonia* as assistant cook (p. 11) for the round trip from Fiume to New York and back to Fiume (pp. 8 and 9). He understood that he was contracting to return to Fiume (p. 10), the terms of the articles being that he should not be paid off until he returned there with the ship (p. 16).

The Alleged Landing Was an Ordinary Desertion.

The *Slavonia* arrived at her pier in New York early in the morning of October 10, 1905, at the end of her voyage from Fiume, Hungary (p. 5). Ramadonawich worked all that day at his ordinary duties (p. 9). At quarter of six o'clock in the evening, after finishing his day's work, he reported to the head of his department (p. 11). He then went to his room and washed and dressed. After this, with several other members of the crew, he went down the gangplank out on the pier and into West street to take a walk (p. 9). No one stopped him either on the gangplank or on the pier (p. 9). It was the rule of the ship that members of the crew whose records were good could go ashore after the day's work was over (p. 18), each

department merely keeping enough of its force to do the necessary night duty (p. 19). Ramadonawich did not expressly ask for shore leave, but he reported to the head of his department at the end of his day's work (p. 11) and it does not appear that he intended to break or evade any rule. So far as appears his record was good and the petitioner had no reason to anticipate his desertion (p.17). He, in fact, left the ship without any intention of deserting, but on the contrary with the intention of returning (p. 11).

After leaving the pier he separated from his companions. When he did this does not appear. Some time thereafter he made up his mind not to go back to his ship, and deserted (p. 11). There is nothing in the record to indicate that he ever intended to give up following the sea, or that he ever intended to remain in the United States. He was called by the Government as a witness and the foregoing facts as to his acts and intentions were proved by his testimony, and there was no contradictory or conflicting evidence, and the Government did not contend at the trial, or assume to show that his desertion was anything other than the ordinary desertion of a roving seaman in a foreign port.

Desertion of Seamen at New York.

Mr. Vernon H. Brown, who has been agent of the Cunard Company for twenty-five years and in the shipping business for fifty years (p. 11), and Captain Stenger of the steamship *Noordam* of the Holland-American Line, who has been coming to the port of New York for twenty-four years (p. 22), both testified that, from their experience

and in their opinion, it is impossible for a shipmaster to prevent all desertions from a crew at the Port of New York, no matter what precautions he might take (pp. 13, 22). There are desertions from almost every ship that comes to New York (p. 13). It is rare that there is an overplus of sailors in this port. In the majority of cases the demand for men is greater than the supply (p. 13). Such desertions at New York do not indicate that the deserters become permanent residents in the United States (p. 13). Mr. Brown was unable to recall any cases where the deserters were found to have become permanent residents of the United States. As a rule they only land temporarily and re-ship at the first opportunity (p. 13).

Shore Leave.

Mr. Brown also testified that it is invariably the custom to allow shore leave to crews in New York, varying somewhat as to details with the different departments of the ship (p. 12). Sailors generally go ashore when they get through their work at sunset or whatever time it may be (pp. 12, 13). They have always been in the habit of doing this (p. 13). To refuse all shore leave to members of the crews would, in his opinion, and from his experience, result in open rebellion and refusal to work, and furthermore would inspire them with a greater desire to desert than would be the case if they were not subjected to the hardship of confinement (p. 13). Capt. Taylor, the petitioner, testified that he had had desertions on previous voyages (p. 20); that to prevent desertions at New York he had once tried the experiment of

refusing shore leave to his crew (p. 17). As a result the crew refused duty (p. 17). On the voyage in question the rule as to shore leave was that all members of the crew of good behavior would have the usual leave in the evening, and this rule the petitioner ordered to be explained to the crew (p. 18). He gave the orders personally to the head of each department (p. 18). It was also the rule that a member of the crew should obtain permission to go ashore from the head of his department (p. 19). These heads of departments knew who went ashore and kept enough members of the crew on board to do the necessary work (p. 19). This was the rule (p. 19), and as far as the petitioner knew it was enforced (pp. 19, 21). Every morning the muster roll of the crew was called (p. 22). If a man was missing he should have been marked down (p. 22), and unless the sub-ordinate officers neglected their duty this would have been reported to the petitioner (p. 23).

The witness was asked whether in his opinion and in his experience it would tend to diminish or increase desertions at the Port of New York to refuse all shore leave to members of the crew, but he was not permitted to answer and exception was taken (p. 17). Captain Stenger of the *Noordam* was asked a similar question, but he also was not permitted to answer, and exception was taken (p. 22). Captain Passow, of the American Line Steamer *St. Paul* (p. 15), said that in his judgment to refuse shore leave increases desertions, but his answer was stricken out by the Court over objection (p. 15).

Precautions to Diminish Desertions.

The petitioner called as a witness testified that he had in force on the voyage in question certain precautionary regulations.

First.—When the crew was shipped abroad each seaman was subjected to a medical examination, and no man was accepted who was not in condition to pass the inspection at Ellis Island (p. 16).

Second.—As the ship approached New York the petitioner ordered that each man be asked if he wished to be paid off at New York and get his discharge there (p. 16). Those who wished to do this he sent down to Ellis Island to the Immigration authorities (p. 17). On that voyage some seamen took advantage of this offer (p. 17). Seamen who were not paid off at New York did not get their pay until their return to Fiume (p. 17).

Third.—In the experience of the petitioner desertions ordinarily take place just before sailing (p. 20). If a man makes up his mind to desert he shows himself at muster on the last day before sailing and then disappears (p. 23). On the day of sailing extra precautions to prevent desertion are taken and were taken on the voyage in question. A general muster of the crew was held in the morning at 7 o'clock (p. 20), five hours before the ship sailed (p. 20). The petitioner was present at this muster (p. 23). No members of the crew were reported absent (p. 20). If any were absent some of the subordinate officers must have known it (p. 20). The petitioner at that muster heard every name answered to as it was called (p.

23). After general muster three officers, one from each department (as was the rule on every voyage) were placed at each gangway with instructions not to allow any member of the crew to go ashore (p. 22). When the *Slavonia* was going down the harbor it was reported to the petitioner for the first time that there had been desertions from the crew (p. 20), and that Elias Ramadonawich was one of these deserters (p. 20).

The petitioner was compelled by the Court to testify as to the number of desertions other than that of Ramadonawich. This was compelled against objection to the materiality of the question and against his plea of privilege on the ground that the answer would tend to incriminate him as to crimes other than that for which he was being tried (p. 18). It appeared that there were twenty-two other deserters (p. 18). No evidence was given as to the cause, time or manner of these other desertions, nor did the Government endeavor to connect them in any way with the desertion of Ramadonawich on the arrival in port. The evidence of the government indicates that these other desertions occurred after the general muster on the morning of sailing (p. 23).

This was petitioner's first voyage to New York on the *Slavonia*. He had no reason to believe that the subordinates to whom he entrusted the enforcement of the rules as to shore leave were not capable and faithful (p. 21). He believed them to be trustworthy (p. 21). He made no change on this his first voyage on the *Slavonia* from the precautions he had used on other voyages on other ships (p. 20). While he had had deser-

tions from time to time (p. 20), there is no evidence to indicate that these precautions had not previously proved as effective in diminishing the number of desertions as could be expected in the light of the fact that it is impossible to prevent all desertions (p. 13).

Interpretation of the immigration act by the Bureau of Immigration.

As bearing on the interpretation of the Immigration Act, it was proved that the Immigration Bureau does not designate any place at which merchant ships which come from foreign ports but do not carry passengers shall land their crews (p. 6), that a seaman who has regularly shipped in good faith is not treated as an alien within the meaning of the act by the Department if he is going back with his ship (p. 6), and that the Department does not physically examine them or require their names to be entered on the manifests which are required to be delivered at Ellis Island under the 12th section of the act (p. 7).

The petitioner offered, and the Trial Judge excluded, a portion of the last annual report of the Commissioner General of Immigration (pp. 7, 8), for the fiscal year ending June 30, 1905, where the Commissioner recommended as follows:

> "Legislation should be adopted to check "violations of the immigration laws by pro- "fessed seamen, thus taking advantage "of their status acquired under one law to "escape the operation of another. Such "legislation should impose a sufficient pen- "alty upon masters of vessels for signing "other than *bona fide* seamen upon their crew "lists, thus enabling such pretended seamen

"to enter this country without the examina-
"tion made of all other aliens by simply de-
"serting after arrival at our ports. Masters
"of vessels should be required to notify in-
"spection officers upon arrival and before de-
"parture from ports of this country, so that
"such officers may be able to ascertain wheth-
"er aliens brought thereon have departed, if
"inadmissible to the United States. The mas-
"ters should also be held accountable for any
"alien seaman brought by them who, he is
"informed by an immigrant inspector, should
"be retained on board as an inadmissible
"alien, as they are for the escape of alien pas-
"sengers denied a landing" (p. 8).

The Trial Judge denied the petitioner's motions for a dismissal of the indictment made at the close of the Government's case (pp. 13, 14), and for a direction to the jury to acquit at the close of his own case (p. 23). Exceptions were properly taken to both rulings (pp. 14, 23).

The Court ruled and charged the jury in substance that:

(1) Bona fide members of a crew, if they be aliens, are within the purview of Section 18 of the Immigration Act of 1903;

(2) The fact that a Captain allows his alien seamen shore leave does not in itself establish that he has landed or permitted an alien to land and broken the law; but if one of these seamen after he gets ashore decides not to return to the ship and deserts, then the Captain has within the meaning of the Statute landed or permitted an alien to land, and the only question for the jury is whether the Captain had adopted due precautions to prevent

the desertion of the seaman in question (pp. 24-26).

The jury found the petitioner guilty, and the Trial Court, denying his motions to set aside the verdict and for a new trial and in arrest of judgment, sentenced him to pay a fine of $500, or to remain imprisoned in the Kings County Penitentiary until the fine was paid (pp. 29, 30). Pending appeal he was discharged on giving a bond to appear when required (pp. 31, 32).

The decision of the Trial Court was affirmed by the United States Circuit Court of Appeals for the Second Judicial Circuit by a divided Court, Judge Lacombe and Judge Townsend voting for affirmance and Judge Wallace voting for reversal and filing a dissenting opinion.

Opinion of Judge Lacombe (pp. 43-48).

Dissenting opinion of Judge Wallace (pp. 49-53).

Specification of Errors.

The petitioner claims that the Trial Court erred:

1. In denying the motion of counsel for the petitioner to dismiss the indictment and direct the jury to acquit, on the ground that

a. The evidence shows that the alien in question was a *bona fide* member of the crew of the *Slavonia* articled to return on the crew to the foreign port from which he shipped. The term "alien" as used in the Act of 1903, in Sec. 18 thereof, means alien passengers and does not include such a member of the crew.

b. Such a member of the crew is not brought to the United States within the meaning of the Act of 1903 or Sec. 18 thereof.

c. The evidence shows that when the alien went ashore he intended to return to the ship, and fails to show that even after he had determined to desert the *Slavonia* he ever intended to abandon the sea and to remain in the United States. The act of allowing, or not preventing, such an alien to go ashore after his day's work under the circumstances shown by the evidence was not a "landing or permitting to land" within the meaning of the Act of 1903 and Sec. 18 thereof.

d. The Act of March 3, 1903, and Sec. 18 thereof does not apply to deserting seamen (pp. 33, 34).

2. That the Trial Court erred in instructing the jury that Sec. 18 of the Immigration Act applies to aliens who are *bona fide* seamen as appears by the following instructions given during the course of the charge to the jury:

"The indictment charges that the defend-
"ant, as master of the steamship *Slavonia*,
"and without adopting due precaution to pre-
"vent the landing from the ship of an alien,
"as provided by law, then and there did un-
"lawfully and willfully land and permit to
"land within the United States the alien at
"a place other than that designated by the
"Immigration Officers of the Port. That is,
"the man was not passed through Ellis Is-
"land. The statute provides that it shall be
"the duty of the owners, officers and agents of
"any vessel bringing an alien to the United
"States, to adopt due precaution to prevent
"the landing of any such alien from such ves-
"sel at any time or place other than that des-
"ignated by the Immigration Officers, and any

"such owner, officer, agent or person in "charge of such vessel who shall so land or "permit to land any alien at any time or place "other than that designated by the Immigra- "tion Officers, shall be deemed guilty of a mis- "demeanor.

"Now you see that the statute says that it "shall be the duty of the officer to adopt due "precaution to prevent landing and that he is "punishable if he lands or permits the alien "to land. Now a statute is to be considered "reasonably so as to give force and effect to "all its provisions, if possible, and words are "deemed to be used in their ordinary sense. "Now if a captain under this statute should "take a man and let him go, say to him, 'Go "off the ship and sever our relations; you go "ashore,' he would then land him. If a man "said to the captain: 'I am going ashore' and "the captain knew that he was going ashore, "or it was reported to him and he had reason "to believe that he was going ashore, and he "stood by and did nothing, then he would per- "mit him to land, which would be a connivance "and a concert of action between the alien "and the captain that would be so apparent "that, of course, the case would not be here. "But suppose that he does not know in the "particular case that the alien is going to de- "sert the ship and land; that is, to go ashore "for the purpose of remaining, or if he does "go ashore without that intention and that he "changes his mind afterwards and remains, "still it is the duty of the captain to use due "precaution, lest a member of his crew, an "alien, does go ashore and fails to return. "Now mark my words: 'Due precaution,' be- "cause the word 'permit' means to allow an "opportunity. Another meaning is to take no "steps to prevent. So if the captain of the "ship does not use due precaution to shut "off opportunity for this desertion and land- "ing, due precaution to prevent the overt act "which the alien does, then he would fall un-

"der the condemnation of the act" (pp. 23, 24).

3. That the Trial Court erred in refusing to give to the jury the following instruction, as requested by the petitioner:

> "That if the jury find that Elias Ramadon-
> "awich was a *bona fide* member of the crew
> "and that he intended to return to the ship
> "when he went ashore, permitting such going
> "ashore was not permitting a landing under
> "the terms of Sec. 18 of the Immigration Act"
> (p. 38).

4. That the Trial Court erred in overruling the objection of counsel for the petitioner and compelling the petitioner as a witness to answer the following question:

> "Q. With the recollection of having seen
> "that log book and from your general knowl-
> "edge, when you left the port of New York,
> "October 17, 1905, were there not then miss-
> "ing from the vessel twenty-three alien sea-
> "men whom you had brought over with you
> "on October 9, 1905, and who deserted your
> "ship here while she was in port on that
> "trip?"

Which question was answered as follows:

> "A. Yes" (p. 34).

6. That the Trial Court erred in instructing the jury that they might take into consideration the desertion of twenty-three men on the same trip of the *Slavonia,* as appears in the following instruction given during the course of the charge to the jury:

> "Now I have allowed evidence here of what

"happened. Twenty-three men deserted in "this port and did not return to the ship. Now "we are trying but one question of the guilt "or innocence of the defendant as to this par- "ticular man, but the question of the num- "ber of men that escaped from the vessel may "be considered by you upon the question of "whether he was using due precautions to "prevent seamen escaping. Of course, if the "case presented to you was that but one man "escaped, the reflection upon the diligence of "the captain or his officers, or both, would be "quite different than if it was shown that the "whole crew went ashore, and though you "have a right—I am exaggerating this state- "ment for the purpose of illustrating—when "you come to consider the negligence of the "captain, or of his using due precautions, if "you find that twenty-three men escaped, the "next question is, how does that bear upon "his guilt or innocence in this case?" (p. 36).

FIRST POINT.

To sustain the conviction below it has been necessary to give to the word "landing," as applied to a seaman, a special and unusual meaning different from that in which it is used when applied to alien passengers.

Such a construction of this statute is in palpable violation of the rule that penal statutes should be strictly construed.

Sec. 18 of the Immigration Act of 1903 required

the petitioner "to adopt due precautions to prevent the *landing* of any such alien from such vessel at any time or place other than that designated by the immigration officers." In the opinion of the majority of the Circuit Court of Appeals, written by Judge Lacombe, the word "landing" as used in this section is construed thus:

> "It is next suggested that the statute, if "held to cover seamen, would be so harsh and "oppressive that it cannot be supposed that "Congress would have passed such an act; "and it is argued that every time an alien sea- "man or officer went ashore to report to his "ship's owner, or to the consul or to the cus- "toms authorities the master would be liable "to fine and imprisonment. This puts an un- "reasonable construction on the act; the of- "fence is failure to provide due precautions "against landing. It could not be held that "there was any such failure where a trusted "and apparently trustworthy officer or sea- "man was thus engaged temporarily on shore "about the ship's business" (pp. 46, 47).

In dissenting from the views of the majority Judge Wallace criticises the above construction as follows:

> "The majority opinion, in order to obviate "the hardship and inconvenience which would "result if alien seamen are included in the "statute, attempts to mitigate these conse- "quences by giving a more liberal interpre- "tation to the term 'landing' than is permit- "ted by the language of the section. The "opinion virtually declares that if seamen "are allowed to go ashore under such rules, "discipline and restraint as would tend to "bring them back to the ship, they are not "'landed' within the meaning of the section. "According to the accepted meaning the act

"of landing is 'setting on shore; coming on "shore.' Giving the language of the section "its ordinary meaning, it is none the less an "offense to land a sailor that he has been "landed under precautions which will ensure "his return to the ship. If sailors are in- "cluded in the statute, it seems plain that "they cannot be permitted to go ashore by the "officers or the owner of a vessel, and any "failure to take sufficient precautions in that "behalf is a violation of the section. I cannot "agree to such a latitudinarian construction "of the statute for the purpose of eliminating "its objectionable features and fortifying the "argument that Congress intended to include "sailors" (p. 52).

This marked difference in the construction of the word "landing" as applied to a seaman and passengers or all other persons in the ship is plainly stated in the charge of the trial judge cited above and on the strength of which he permitted the jury to convict.

This statute is a penal statute and is therefore to be strictly construed.

Hackfeld v. U. S., 197 U. S., 442, 450.

Its language is to be interpreted according to the common and ordinary meaning of the words used, for the words are common English words and are not of an ambiguous or doubtful meaning. They require the ship's officers to take due precautions "to prevent the landing of any such "alien from such vessel at any time or place other "than that designated by the immigration offi- "cers."

This seems to be a perfectly plain statement of the duty resting upon the ship's officers. It implies that the immigration officers do by some gen-

eral rule or special order designate a time and a place for the landing of aliens who come within the provisions of the Act, and it was proved that the place so designated in the port of New York is Ellis Island (p. 6).

What then is meant by "landing of any such alien "*from such vessel* at any" place other than Ellis Island? If this question can be answered with certainty, it will go far toward answering the question here involved.

But the question does not seem to admit of any doubt. The place where a person lands "*from*" a vessel is the place where he steps ashore, and the connection in which the words are used indicate that this is the place referred to by the statute, for it is the master who is to prevent the landing, and it is obvious that he can only prevent it where he is; that is, at the vessel.

That the word "landing" in Section 18 and throughout the act is used in its ordinary sense of going on shore is shown by the care taken by Congress to provide that such a going ashore should not be deemed a landing under one provision of the act, where it was necessary to give a special meaning to the word. It was obviously impracticable to properly inspect and separate numerous arriving immigrants in the contracted quarters on shipboard, and it was accordingly necessary that they should be removed for inspection to some proper place. But it was also necessary, as provided by Section 8 of the Act, to prohibit masters of vessels from landing aliens who had not been duly inspected. To deal with this situation, it was accordingly provided by Section 16 of the Act that immigration officers may order a temporary removal of aliens for examination at a

designated time and place "but such temporary removal shall not be considered a landing."

Yet it has been claimed by the Government and held by the Courts below, that the word "landing" as here used means in respect to seamen—and perhaps only in respect to alien seamen—not the leaving of the ship and going ashore, but such a permanent severance of his relations with the ship as is involved by the act of desertion. This act may take place far away from the vessel, and hours or days after he steps ashore on shore leave:—it is the act of changing his mind when he abandons the intention of returning and forms the intention to desert.

The Government is forced to this contention by the strength of the facts showing that sailors *must* go ashore, and practically *must* have shore leave when in port.

This act applies to all vessels from abroad, not only to the large steamers which come to the larger ports and have gangs of stevedores to handle their cargo, but also to vessels coming to the smaller ports and to smaller vessels, whose crews have to do much of the work connected with docking, discharging and loading the ship.

After the ship has passed quarantine inspection there are numerous duties connected with the navigation or with the voyage which make it necessary for some of the officers or crew to leave the ship—the mooring of the vessel, the discharge and loading of the cargo, the entering and clearing of the ship, the purchase of supplies, the reporting to agents or consignees—all these acts are absolutely necessary if commerce is to continue. Some one connected with the ship must go ashore, and under the conditions which now prevail, and which have prevailed for years past, almost all of the

officers and crews of the vessels engaged in foreign commerce are aliens.

In addition to this, it is practically necessary that seamen should have shore leave. It is accorded to them by commercial custom and if it were not accorded, it would impede and possibly stop commerce. If captains were required to imprison seamen on the ship while in port, the immediate result would probably be mutinous conduct and refusal to work on the part of the men (p. 13), and if such regulations were general and were enforced, men could not be found who would ship under such hardships.

Congress cannot have intended to stop this going ashore on the part of *bona fide* seamen, but in order to sustain the conviction here, it is claimed by the Government that a seaman may lawfully, and notwithstanding this statute, have shore leave and go ashore, and that if he returns that there is no violation of the Act, but that if he deserts, that then, and not till then, he severs his connection with the ship and "lands," and that if the master has not taken reasonable precautions to secure his return; that is, to prevent his severing his connection with the ship, the master is liable under the Act.

According to this theory of construction, at least as applied to seamen, the plain words of the Act are to be interpreted, not according to their common meaning, but in a new and involved sense —a sense which no one would think of applying to them in the case of any alien not a seaman.

The insuperable objection to the adoption of this construction is that it cannot be applied to alien passengers coming by the same ship. As to them, it must be held that the Act means what it

says; that is, that they must remain on the ship till they are landed at the time and place designated by the immigration officers. They cannot be granted shore leave or be permitted to take a walk ashore whether they have finally severed their connection with the ship or not.

The statute says that the officers must adopt due precautions to prevent any alien from landing. If alien seamen are within its terms, then the master must keep them on the ship as well as the passengers. The Act cannot have one meaning for one alien subject to its provisions, and another and quite a different meaning for another alien, also subject to its provisions.

The rule is a simple one, applying to *any alien* who comes within its scope, and if it means that an alien passenger must be kept on the ship, then it necessarily means that any alien subject to its provisions must be kept on the ship.

The rule which requires a strict construction of a penal statute requires a certain and definite construction of the words used in their plain sense, and it requires the same construction as to all persons subject to its provisions. Its meaning is not to be strained to bring any person within its effect whom its terms do not obviously cover.

> "A penal statute cannot be extended by im-
> "plication or construction to cases within the
> "mischief, if they are not at the same time
> "within the terms, of the act, fairly and rea-
> "sonably interpreted."

Bishop on Statutory Crimes, Sec. 190 e.

> "The rule that penal laws are to be con-

"strued strictly, is perhaps not much less old "than construction itself. It is founded on "the tenderness of the law for the rights of "individuals; and on the plain principle that "the power of punishment is vested in the "legislative, not in the judicial department. "It is the legislature, not the Court, which is "to define a crime, and ordain its punish- "ment."

U. S. v. *Wiltberger,* 5 Wheat., 76, 95; *Hackfeld* v. *U. S.,* 197 U. S., 442, 450.

"The case must be a strong one indeed, "which would justify a Court in departing "from the plain meaning of words, especially "in a penal act, in search of an intention "which the words themselves did not sug- "gest."

U. S. v. *Wiltberger,* 5 Wheat., 76, 96.

In U. S. Sheldon, 2 Wheat., 119, the defendant was indicted for alleged violation of a statute passed during the War of 1812 which imposed certain punishment on any citizen of the United States who "shall transport or attempt to trans- "port over land or otherwise, in any wagon, cart, "sleigh, boat, *or otherwise,* naval or military "stores," etc., to Canada. The defendant had driven certain fat oxen, cows and steers from the United States into Canada, but it was held that the words transport "in any wagon, cart, sleigh, boat or otherwise" did not include the defendant's act in driving the cattle over the border.

This Court held (p. 121):

"It may be admitted, that the mischief is "the same, whether the enemy be supplied "with provisions in the one way or the other; "but this affords no good reason for constru-

"ing a penal law by equity, so as to extend
"it to cases not within the correct and ordi-
"nary meaning of the expressions of the law,
"particularly when it is confirmed by the in-
"terpretation which the legislature has given
"to the same expressions in the same law."

In Sarlls *v.* U. S., 152 U. S., 570, this Court, in holding lager beer not to be a spirituous liquor nor wine, within the meaning of those terms as used in Rev. Stat., sec. 2139, said:

"Nor can courts, in construing penal stat-
"utes, safely disregard the popular significa-
"tion of the terms employed, in order to
"bring acts, otherwise lawful, within the ef-
"fect of such statutes, because of a supposed
"public policy or purpose. The danger of
"substituting for the meaning of a penal stat-
"ute, according to the popular and received
"sense, the conjecture of judges as to a sup-
"posed mischief to be corrected, is pointed
"out by Chief Justice Marshall, when, in the
"case of *United States* v. *Wiltberger,* (5
"Wheat., 76, 96, he said: 'To determine that
" 'a case is within the intention of a statute,
" 'its language must authorize us to say so.
" 'It would be dangerous, indeed, to carry the
" 'principle that a case which is within the
" 'reason or mischief of a statute is within its
" 'provisions, so far as to punish a crime not
" 'enumerated in the statute, because it is of
" 'equal atrocity, or of a kindred character,
" 'with those which are enumerated. If this
" 'principle has ever been recognized in ex-
" 'pounding criminal law, it has been in cases
" 'of considerable irritation, which it would
" 'be unsafe to consider as precedents form-
" 'ing a general rule for other cases.' "

If there is a class of persons literally within the terms of this immigration statute, but who for

sufficient reasons cannot be held subject to its obvious requirements (as in this instance seamen who *must* leave the ship *on ship's duty,* and virtually *must* be allowed to leave the ship on shore leave), then the only permissible conclusion is, not that the rule of the statute will be modified as to them by giving it an entirely different meaning so as to reach them, but that they do not come within the statute, because "a thing may be with-"in the letter of a statute yet not within the stat-"ute, because not within its spirit, nor within the "intention of its makers."

Holy Trinity Church v. *U. S.,* 143 U. S., 457.

The construction of this statute contended for by the Government would not be a strict construction, but a flagrantly liberal construction of a penal statute. And there would be no security of liberty or life if such a method of construction should prevail in regard to penal statutes. If seamen are within this Act, the Act is violated every time the master permits them to go ashore for any purpose, whether on shore leave or on ship's business. But such a result is not claimed by the Government, and was expressly disclaimed by the Courts below.

In the *Kirby* case, 7 Wall., 486, Mr. Justice Field said:

> "General terms should be so limited in their "application as not to lead to injustice, op-"pression, or an absurd consequence. It will "always, therefore, be presumed that the Leg-"islature intended exceptions to its language, "which would avoid results of this character. "The reason of the law in such cases should "prevail over its letter."

Apparently what has suggested this strange and unnatural construction to the Government so as to include alien seamen, is the supposed necessity that they should be so included to prevent possible evasion of the immigration laws by means of a fictitious enlistment as seamen by persons who are really immigrants, and who thus seek to avoid inspection and then desert.

But the facts of this case do not justify such a suggestion on the part of the Government. The claim of the Government is that the immigration law applies to one who is really an immigrant and not a seaman, while the question here presented is whether the immigration law applies to one who is really a seaman and not an immigrant.

No question whatever is presented in this case as to the status of a deserter as a *bona fide* seaman. And there is no proof or suggestion in this case to the effect that the petitioner had any reason to believe the deserter to be other than such a *bona fide* seaman.

It is respectfully urged that the petitioner is entitled to have this case considered on the basis of the facts as here found, and that he cannot be punished for failing to prevent the desertion of a *bona fide* seaman because some other captain at some future time may fail to prevent the desertion of some person who is really an immigrant and not a seaman.

As to the actual desertions of *bona fide* seamen, they undoubtedly embrace some cases of abuse or evasion by such seamen of the policy of our Government intended to be expressed in the immigration laws. But what is the remedy? Surely such

possible evasions of the law do not justify a departure by the Court from the ordinary rules of construction of a penal statute—the engrafting on its plain terms of such fantastic modifications as was done in this case, transforming a plain "*landing*" into a severing of the relations between the ship and the seamen—an act having no real relation to the act of landing plainly described in the statute—and transforming a requirement of precautions to prevent landing into precautions to secure a return of seamen who lawfully land.

The real remedy, and it is believed the efficient remedy, is pointed out in that portion of the Annual Report of the Immigration Bureau which was offered at the trial (and is quoted above at pages 9 and 10), namely, proper legislation to guard against such evasion by deserting seamen.

This recommendation was made by the head of the Bureau of Immigration in his last report published before the trial of this case, and even if the report was properly excluded as evidence to be considered by the jury, it may yet be considered by the Court as the view of this question that has been taken by the Department of the Government charged with the administration of this law, and it is in itself an admission by that Department that *bona fide* seamen are not subject to the law.

The idea of the learned Courts below that the master could and should under the statute take precautions to get a deserter back is not based on any statutory requirement. It certainly has no support in Section 18, nor in the Immigration Act. The master cannot follow the seamen on shore, or arrest them, or bring them back to the ship. The Consul of the country to which the ship be-

longs has by statute the right to apply to a judicial officer for the arrest of deserters and has power to send them home, but there is no law which empowers the master to do this.

It would thus seem clear that Congress cannot have intended Section 18 to apply to *bona fide* seamen for it made the prohibited offence consist of "landing," and seamen must be landed if foreign commerce is to continue. But in reply to this argument the Government points to the word "alien" as used in Section 18, and claims that it is broad enough to include alien seamen.

It remains therefore to consider whether the word "alien" is used in Section 18, and throughout the Immigration Act of 1903, in such a sense as indicates that Congress intended it to apply to *bona fide* seamen.

SECOND POINT.

A careful consideratinn of the Immigration Act of 1903 and of its several provisions shows that it was not intended to apply to bona fide seamen.

A.

The general purpose of the Statute of 1903 as a whole and of Section 18 in particular is not in harmony with the application of the statute to the deserton of alien seamen.

The Government can hardly dispute the proposition that the principal object of the statute in general and of Section 18 in particular is to deal with alien passengers or alien immigrants. The very caption of the Act of 1903 indicates this general purpose. It is entitled "An Act to regulate the immigration of aliens into the United States."

This Court has frequently resorted to the title of an act to aid in construing a doubtful provision.

U. S. v. *Fisher*, 2 Cranch, 358, 386.
U. S. v. *Palmer*, 3 Wheat, 610, 631.
Myer v. *Car Co.*, 102 U. S., 1, 12.
Coosaw Mining Co. v. *So. Carolina*, 144 U. S., 550, 563.

But without ascribing undue importance to the phraseology of the caption, it must be plain that it indicates that the statute which follows relates

to the arrival in the United States of that vast multitude who are brought to this country by foreign transportation lines, who come here to settle or at least to work till they have bettered their fortunes. It is needless to comment on the difference between this formal change of residence and the act of a sailor who deserts from one ship to ship on another. Sailors as a class are rovers and like change of scene and condition. At the end of a long voyage they naturally desire shore leave, and by universal custom are entitled to it. But once ashore their tendencies lead them to enjoy themselves and often to overstay leave and ship on a new vessel. These desertions are radically different from the act of an alien who comes to settle or to seek his fortune by labor ashore.

Taking up the Act itself, the first section contains a provision intended to furnish funds for carrying out the purpose of the Act. It provides that there shall be collected a duty of $2.00 "for each and every *passenger* not a citizen of the United States," etc., to be paid to the Collector of the Port "to which such *alien passenger* shall come," that this money shall go to constitute an immigration fund to be used * * * "to defray all expense of regulating the *immigration of aliens* into the United States under this Act."

It is passengers, then, whose entrance into this country is to be supervised, and the fund collected from them is to be used for the purpose of regulating immigration.

Then follow a group of sections (Sections 2, 3, 7), which enumerate the grounds on which certain classes of intending immigrants are to be kept out of this country. If the immigrant is

suffering from a contagious disease, is a contract laborer, or has a criminal record or is an anarchist, etc., he is to be excluded.

The next group of sections (Sections 9-17) provide for an inspection by the Immigration officers to determine in the case of each immigrant whether these grounds of exclusion exist. Section 18 (the section under consideration) and Section 8 prevent the evading of this inspection by making it unlawful for the steamship to disembark the aliens at a place other than that designated by the immigration authorities and without an inspection.

Section 18 is of great importance in the structure of the act. If steamship's officers may disembark passengers wherever they wish, or generally at the pier at which the vessel moored on her arrival, the provisions for inspection and exclusion would be useless. The importance of this inspection of alien passengers is so vital that this section properly makes it a misdemeanor with severe penalties for a captain wilfully or negligently to allow one of them to go ashore and out of the control of the ship's officers except into the hands of the Immigration officers.

The Government must concede that the primary purpose of this section is to insure the inspection of aliens who are within the purview of the act.

Alien passengers must be inspected for they may be within the excluded classes and, therefore, their inspetcion must be insured by stringent provisions. But *bona fide* seamen come and go. *The reason for an inspection fails in their case because they are not coming into the country to stay,* and there is no need to determine the hypothetical question whether, if they were so coming, they

would be excluded. No provision has, in fact, been made for their inspection by the Immigration authorities, and they are not regarded as coming within the law for that purpose (p. 6). If they are not to be inspected, they are not within the reason of the provision aimed to insure inspection.

It must be remembered that the case of aliens who are not *bona fide* seamen but whose enrollment as seamen is merely a device to enter the country, is not here involved. It has always been the law that such persons are immigrants and that the law as to immigrants applies to them. The question here is, whether the immigration law applies to *bona fide* seamen who do not come here as immigrants.

One of the leading cases on immigration law in this country (*Holy Trinity Church v. U. S., 143 U. S., 457*) establishes the precise principle on the basis of which the petitioner now contends, that the desertion of a *bona fide* seaman is not within Section 18, because it was not within its spirit, nor within the intention of its makers.

In September, 1887, the Rev. E. Walpole Warren had made a contract with Holy Trinity Church in New York City to enter its service as rector and pastor. The Court below held that he was subject to deportation under the terms of the contract labor part of the immigration law which made it unlawful "for any person * * * in any man-"ner whatsoever, to prepay the transportation, or "in any way assist or encourage the importation "or migration of any alien or aliens, any foreign-"er or foreigners, into the United States."

In delivering the unanimous opinion of this Court Mr. Justice Brewer said:

> "It must be conceded that the act of the "corporation is within the letter of this sec- "tion, for the relation of rector to his church "is one of service, and implies labor on the "one side with compensation on the other. "Not only are the general words labor and "service both used, but also, as it were to "guard against any narrow interpretation "and emphasize a breadth of meaning, to "them is added 'of any kind;' and, further, as "noticed by the Circuit Judge in his opinion, "the fifth section, which makes specific excep- "tions, among them professional actors, art- "ists, lecturers, singers and domestic serv- "ants, strengthens the idea that every other "kind of labor and service was intended to be "reached by the first section. While there is "great force to this reasoning, we cannot "think Congress intended to denounce with "penalties a transaction like that in the pres- "ent case. It is a familiar rule, that a thing "may be within the letter of the statute and "yet not within the statute, because "not within its spirit, nor within the intention "of its makers. This has been often asserted, "and the reports are full of cases illustrating "its application. This is not the substitution "of the will of the judge for that of the legis- "lator, for frequently words of general mean- "ing are used in a statute, words broad "enough to include an act in question, and yet "a consideration of the whole legislation, or "of the circumstances surrounding its enact- "ment, or of the absurd results which follow "from giving such broad meaning to the "words, makes it unreasonable to believe that "the legislator intended to include the par- "ticular act" (143 U. S., p. 458).

The foregoing construction accords with the

fundamental rules as to statutory construction which have prevailed in England:

> "The words of statutes are not to be considered only, but rather the intent of the matter is to be weighed; for many times things which are within the words of statutes are not within the *purview* of them, which *extends no further than the intent of the makers,* which is the principal thing to be considered" (Italics of author).
>
> Viners Abridgment, Vol. 19, 518.

As a matter of mere etymology the word "alien" is broad enough to include alien seamen, just as it is broad enough to include all alien officers of all grades, and in the *Holy Trinity Church* case it was conceded by this Court that the facts came within the letter of the Immigration Act which was there under consideration The petitioner now asks that this case be disposed of by following the principle which was followed in the earlier case, that is, that where an act is not within the spirit of the statute, nor within the intention of its makers, that the statute shall not be held to apply merely by force of the literal interpretation of a single word which it contains.

The facts here are more strongly in favor of the petitioner than were the facts in the *Holy Trinity Church* case. This is a criminal prosecution in the enforcement of a highly penal statute (*Hackfeld* v. *United States,* 197 U. S., 442, 450). The alleged offense is wholly statutory not involving any moral turpitude. The petitioner is entitled to all the Constitutional protection and all the legal presumptions which are given to one who is accused of crime.

On the other hand in the *Holy Trinity Church* case the question was one simply of deportation where the *rights* of an alien amount practically to nothing, for Congress has absolute power with respect to the admission and exclusion of aliens, and so may exclude for arbitrary reasons.

B.

The use of the word "alien" throughout the Immigration Act of 1903 indicates that as it is used in Section 18 it was not intended to include bona fide seamen.

> "It is the most natural and genuine exposi-
> "tion of a statute to construe one part of the
> "statute by another part of the same statute,
> "for that best expresseth the meaning of the
> "makers."
>
> Coke Upon Littleton, 381 a. b.
> Viners' Abridgment, Vol. XIX, p. 526.

The word "alien" occurs in a number of the most important provisions of the Act of 1903. The Act, as has been pointed out above, follows a well defined plan, the different groups of sections dealing with the different phases of the problem of how to supervise the admission and to secure the inspection of alien passengers.

The word must be considered in connection with a class of persons whose admission into the United States these different parts of the statute are intended to regulate, and the presumption is that it should not be disassociated from that class.

Within a few years prior to the passage of the Immigration Act of 1903 the Federal courts had laid down a rule for the interpretation of immigration statutes. This rule was based on the decision of this Court in *Holy Trinity Church v. U. S.*, already quoted, and the rule provided that immigration statutes "should be construed as a whole and not by selecting particular words or sentences and interpreting them according to their strict letter."

U. S. v. *Burke*, 99 Fed. Rep., 895.
Moffitt v. *U. S.*, 128 Fed. Rep., 375.

Opinions of Attys Gen Vol 23 p 521

This was the existing rule of construction when the Act of 1903 was framed and it is proper that the rule should now be followed in seeking the intention of the law makers.

Therefore, to discover what class of persons Congress intended to cover by the use of the term "alien" in the 18th Section, we must inquire how the word "alien" is used in other sections, and a study of the Act will show that "alien," as generally used throughout the statute, cannot possibly refer to alien seamen.

Taking up now the various sections of the act the attention of the Court is especially invited to the fact that the phraseology and provisions fit the cases of alien passengers, but involve absurdity if applied to alien seamen, and the Court is asked to notice how uniformly the absurdity would reappear if the word "alien" as used in the act were held to apply to alien seamen.

Section 1.

Section 1 provides that there shall be collected a duty of Two Dollars "for each and every *pas-*

senger not a citizen of the United States," etc. This duty is to be paid to the Collector of the Port "to which such *alien passenger* shall come" and shall go to constitute an immigration fund to be used * * * "to defray the expense of regulating the *immigration of aliens* into the United States under this act."

This section defines the classes of persons whose entrance is to be supervised and creates a special fund *which can only be used for the purpose of regulating immigration.*

SECTION 2.

Section 2 defines the excluded classes of aliens.

In construing this section Judge McPherson, in the District Court for the Eastern District of Pennsylvania, has held that the word "alien" must be used in "the sense in which the word has been used in the statutes regulating immigration."

> *Matter of Buchsbaum,* 141 Fed. Rep., 221.

There is an obvious absurdity in claiming that Congress when it enumerated the "classes of aliens" who "shall be excluded from admission" can have had in mind bona fide seamen. The most that Congress attempts to do with these undesirable classes of aliens is to send them away from the country. But in pursuing their regular business, seamen will leave the country without being sent, so that under this Section 2, as throughout the act, we are confronted with the question of the status of the alien. If he is really a passenger and only pretends to be a seaman, he

must be treated as a passenger. If he is really a seaman and not a passenger, then the act cannot be made to apply to him without involving absurdity.

Section 4.

The term "alien" next appears in Section 4, which relates to the exclusion of contract laborers, and makes it unlawful for any person or corporation "in any manner whatsoever * * * in any way "to assist or encourage the importation * * * of "*any alien* into the United States in pursuance of "any offer, solicitation, promise or agreements "* * * made previous to the importation of such "alien, to perform labor or service of any kind, "skilled or unskilled in the United States."

There are at all times thousands of aliens performing labor in the ports of the United States as members of the crews of vessels. Every one of these men is an alien whose importation into the United States has been, not only encouraged, but has been absolutely brought about in pursuance of an express agreement which required him to perform labor or service in our ports.

Now, if the word "alien" as used in this Sec. 4, has the meaning attributed to the word by the Court below, that is, if it be given a meaning broader than *alien passenger* and is applied to the ship's company, then the companies which have shipped these sailors at foreign ports have subjected themselves to heavy penalties. And if the law so interpreted be now enforced, then if transportation companies cannot obtain seamen who are not aliens, they must go out of business, for this Act makes it absolutely unlawful, under heavy

penalties, to bring an alien into this country under contract to perform labor here.

It cannot be necessary to argue that Congress did not intend to create such a situation. But, under the rule adopted by the United States Courts, as above referred to, the word "alien" cannot be given one meaning in Section 4 and a different meaning in Section 18 of the same Act. If this Court is to attribute to Congress an intention of making Section 18 apply to alien members of the ship's company, then the same construction of the words "any alien" must be followed in Section 4. This would probably bring foreign commerce to a standstill, for, as a matter of common knowledge, under present conditions very few Americans are willing to follow the sea, and the crews of the large steamers are made up almost altogether of aliens.

Section 5.

Section 5 provides that for every violation of Section 4 (that is for every person employed abroad to work here) the employer shall forfeit $1,000 to be recovered by the Government or by an informer for his own benefit. If "alien" includes alien members of the ship's company and this law is enforced every company engaged in foreign commerce will be made bankrupt.

Section 6.

Section 6 makes it a violation of the Act to assist or encourage the importation or immigration of *any alien* by promise of employment through advertisement, etc.

It cannot be necessary to argue that this was not intended to apply to alien seamen. Congress can-

not have intended to prohibit *foreign* steamship companies from seeking their crews abroad.

Section 8.

Section 8 imposes a heavy punishment on the master, agent, etc., of any vessel which shall bring into or land in to the United States "any alien not duly admitted by an immigration inspector."

This section is, like Sec. 18, primarily intended to secure the inspection of alien passengers. That "any alien," as here used, does not include members of a ship's company would seem clear, for the words are qualified by the phrase "not duly admitted by an immigration inspector," and as was testified to at the trial by the law officer of the Immigration Department at New York (p. 6), no inspection is made of *bona fide* seamen, and such seamen are not treated as coming within the provisions of the law relating to inspection.

Sections 9, 10 and 11.

Sections 9, 10 and 11 relate to the exclusion of diseased aliens.

These sections have an obvious and beneficial purpose as applied to passengers coming here to stay or to immigrants as a protection to the community against disease or against pauperism but they have no sensible application to seamen who come and go with the ship.

Section 12.

Section 12 provides that upon the arrival "of *any alien* by water at any port within the United States" the master of the vessel having said alien

on board shall deliver to the officers at the port of arrival lists or manifests which shall in answer to questions on the top of said lists "state *as to each alien the full name of each, sex* * * * *the calling or occupation,* * * * the last residence, * * * *the final destination, if any, beyond the port of landing, whether having a ticket* through to such final *destination, whether the alien has paid his own passage, or whether it has been paid by any other person.*"

Here again the section in terms refers to "any alien," but Congress cannot have intended this to include alien seamen, for, if it did, it would require the master to disclose the sex of the seaman, what his calling or occupation is, what his final destination, if any, beyond the port of landing is, whether he has a ticket to that place, and whether he has paid his own passage. It has always been the law, and is the law now, that a person who ships, not as a *bona fide* seaman, but merely as a device to get into the country, is not a sailor, but an immigrant, and should be treated as such, but we are not here considering such a case.

SECTION 13.

Section 13 provides "*all aliens arriving by water* at the ports of the United States shall be listed in convenient groups," that each alien or head of a family shall be given a ticket for identification on arrival, that the list shall be verified by the master who shall state among other things that he believes that no one of such aliens is an idiot or a prostitute.

It can hardly be seriously argued that Congress here intended to require the Captain to give each

seaman in his crew a tag to identify himself *and his family*, and then to require the Captain to swear that he considered that the seaman was not an idiot or a prostitute. But here again the section if literally interpreted, applies to "all aliens." The government in practice wholly ignores this section as applied to seamen and thereby virtually admits its inapplicability to that class of persons (p. 6).

Sections 14 and 15.

Section 14 requires the surgeon to make oath as to the physical condition of "said aliens," and Section 15 imposes a fine on the master for failing to enter names on this manifest or list.

The ordinary quarantine regulations provide for the discovery of disease among seamen as well as among passengers, and it cannot be argued that recourse must be had to the immigration laws to protect us against disease in the crews of ships.

Section 16.

Sction 16 requires immigration officers on receipt of the lists above provided for to inspect the aliens so listed, and permits them to temporarily remove such aliens for examination.

It was proved in this case, that immigrants are removed to Ellis Island for inspection, and it is well known that it is necessary to remove them there if a large number of immigrants are to be promptly inspected. If the word "aliens," as used in this act, refers to alien seamen, then under this law a captain must enter the names of all aliens in his crew on the list and they must all be removed to Ellis Island. This

would leave most vessels without any persons in charge to even watch them, much less to work and navigate them. If "aliens" has the meaning attributed to it by the Court below, then if the captain and his officers were aliens, he would have to enter his name and theirs on the list and they would all have to go to Ellis Island.

The language and provisions of Sections 12 to 16 are applicable to passengers, but entirely inapplicable to members of the crew. These provisions for an inspection, as has been said, are not enforced in regard to *bona fide* seamen and are not treated by the Immigration authorities as applying to alien members of the ship's company (p. 6). (See also present rules of Bureau of Immigration, Appendix A.)

Section 18.

Section 18 immediately follows these sections, and, as has been pointed out above, its severe penalties were evidently intended to insure that transportation companies shall turn the passengers over to the immigration officials for inspection. All that Congress intended to do by this section was to secure such inspection. As the inspection is only of *alien passengers*, it would seem that "alien" had been used in Sec. 18 as it had been used repeatedly in the preceding sections of the Act to designate merely the class with which the statute is concerned.

Section 18 is the section under which the indictment in this case was found. It makes it the duty of the officers of a vessel "bringing an alien into the United States to adopt due precautions to prevent the landing of any such alien" * * * "at a

place other than that designated by the immigration officers'' and it provides that ''any officer'' * * * ''who shall land or permit to land any alien'' at a time or place other than that so designated shall be punished by a fine or imprisonment or both.

Here again, we have the familiar use of the word ''alien.'' If it is to be construed in this section, as it must be construed in earlier sections if absurdity is to be avoided, then it applies here to alien passengers, and when so construed this section fits in with other provisions of the act and makes part of a harmonious system for regulating immigration and for the inspection of alien passengers.

If the word ''alien'' as here used has the meaning attributed to it by the Court below then, it can only be for the reason that the word ''alien'' is so broad a term that it *must* include *all aliens*. If this is its meaning then this section means that every alien must stay on the ship or land at Ellis Island.

In this case and in most cases the captain and officers and surgeon of the ship are aliens, and if this section means what the Court below says it means, those officers cannot land at this port for any purpose, even to enter or clear the ship, and those who need to do business with the officers of vessels must seek them on their vessels.

The obvious absurdity of such a situation shows that in construing the word ''alien'' to mean alien seamen the learned Court below has erred in extending this immigration statute to reach those who are not passengers, but who are seamen and who are governed by the laws relating to seamen.

It would not be difficult to go through the remaining sections of this act of 1903 and show that

where the word "alien" is used it refers to the class intended to be reached by an immigration statute, but not to alien seamen. Construing this statute of 1903 as a whole, it is impossible to hold that the word "alien" includes alien seamen without involving absurdity and injustice.

C.

The change made by the Act of 1903, by using the word "alien" in place of the words "alien immigrant" as occurring in previous statutes, indicates an intention on the part of Congress to make the Act of 1903 apply to alien passengers who may not technically be immigrants, but it does not indicate any intention to make it apply to aliens who are bona fide seamen.

Section 18 of the Act of 1903 substantially reenacts part of Section 8 of the Act of March 3d, 1891. The only change in the phraseology as between the earlier act and the present act which need be considered is that where the earlier statute made it the duty of officers of vessels to adopt due precautions to prevent the landing "of any alien immigrant" the present statute makes it the duty of those officers to adopt precautions to prevent the landing "of any alien" (omitting the word "immigrant").

But a comparison of the earlier Immigration Statutes with the present statute, which is a codification of the earlier acts, will show that a similar

change is made in many of the provisions. In the immigration statutes which precede the Act of 1903 the words "immigrant" or "alien immigrant" were used as many as fourteen times, but in the Act of 1903 the words "alien immigrant" do not occur and the word "immigrant" is never used except as an adjective, as, for example, in referring to the Immigrant Fund. The word "immigrant" is never used in the Act of 1903 as defining the class of people who are to be inspected, etc.

So long as the words "alien immigrant" were used as defining those who were to be inspected, it was necessary to show that a man was an immigrant if he was to be legally inspected or detained for inspection. But it was often difficult to show this. A person with a criminal record abroad or with a "loathsome or contagious disease" (Section 9) might come by first or second cabin, and if he disclaimed any intention to immigrate permanently to this country, it would be difficult for the Government, under the terms of the previous statutes, to show any right to examine or deport the man. A still more numerous class of alien passengers are those who come here, not with the purpose of settling, but to seek employment for a few years and then, after they have earned enough money, to return to their homes abroad.

Technically speaking, such persons probably are not immigrants, and it is a serious question whether the immigration laws in their previous form gave any right to examine and deport them, but as they constitute a considerable part of the whole body of alien passengers arriving in this country, it was obviously important that they should be inspected.

This subject was discussed when the bill was before the Senate in the committee of the whole, as follows:

"Mr. Platt, of Conn.: Mr. President, before the Bill is reported to the Senate, I should like to understand, if I may, what the effect of this Bill is as to the exclusion of aliens. It has been very much amended; so much so that I am in doubt as to what its effect will be. If I understand the Bill, *it now purposes to exclude from the United States only alien immigrants* and that all other persons who are not immigrants can come into the United States freely without the payment of the Head Tax. *I do not think that will exclude a great many* from the United States if the language is construed according to its meaning. It was stated yesterday in debate, I see, that an immigrant is a person who comes from a foreign country with the intention to settle in this country.

"*Mr. Lodge.*—Not to settle.

"*Mr. Gallinger.*—To remain, however, that would mean to settle.

"*Mr. Platt.*—I certainly think I am not mistaken in my recollection of the definition as quoted from the Century Dictionary by the Senator from Ohio (Mr. Foraker). I will find it in a minute. However that may be whether it means to settle in the United States or to remain in the United States, *it will not reach the great class of undesirable migration to this country.* The Senator from Ohio (Mr. Foraker), said: 'The Century Dictionary gives as one of the definitions of the word 'Immigrant,' a foreigner who enters the country to settle there. I thought I was not mistaken in my recollection.

"*Mr. Lodge.*—Will the Senator allow me to ask him a question?

"*Mr. Platt.*—Certainly.

"*Mr. Lodge.*—I suppose the class of undesirable immigrants to whom the Senator refers are those known as birds of passage, who come here for a short time and return, taking their money with them. But the word '*immigrant*' is the word now used in all our laws on the subject; it is perfectly justified, and the classes it covers are perfectly well known; and I think its meaning has been established by decisions. I think the Senator will find that it will cover all undesirable classes, if I guess right, the classes he has in mind.

"*Mr. Platt.*—That is what I wanted it for. I am not familiar with the decisions. I simply know that yesterday it was stated in the Senate that the Century Dictionary definition of *immigrant is a person who comes here to settle. It does not seem to me that it is worth while to leave the matter so indefinite as it will be left by this Bill. I apprehend that after this Bill is passed there will be very few alien persons coming to this country who will admit that they have come here to settle or remain.* They will all claim that they have been informed that there is plenty of work to be had in this country at good wages and that what they have come here for is to work until they get a little money, and then take themselves home and better their condition at home. Now, how in the particular enforcement of this bill, is that question to be made? Take the Italians, they do not come here intending to remain and settle in this country. They come as do the Chinese to work a while, get American wages and then go back to their country and buy a little farm or a business there and so better their condition at home. *The question will immediately arise whether they are immigrants in the true meaning of that word*"

(57th Cong., 2nd Sess., 36th Cong. Rec., Part I, p. 135. Italics ours).

As will hereafter appear, the Immigration Act of 1903 was a codification of previous statutes, and the changes made were made mainly for administrative convenience. It was clearly in the public interest that immigration officers should be empowered to inspect all alien passengers, whether they could technically be considered permanent immigrants in this country or not, and to accomplish this purpose it was desirable that the use of the words "alien immigrants" should be discontinued in favor of some word or words broad enough to include all alien passengers.

To accomplish this purpose, Congress used the word "aliens," and by comparing previous immigration statutes with the Act of 1903, it will be seen that in every case where the change was made there is an evident intention on the part of Congress to reach alien passengers, who might not be technically immigrants. It will also be obvious that the change cannot be deemed intended to include *bona fide* seamen without involving absurdity. Nor was there the slightest intimation in the debates that the change was made with any purpose to include *bona fide* seamen.

This general purpose of including all alien passengers but only passengers is shown by an examination of the sections where the word "aliens" is substituted for "alien immigrants."

For example, Section 1 of the Act of 1893, which relates to the making out of lists or manifests, refers to the persons whose names are to appear in those lists as "alien immigrants" or as "immigrants." While in Section 12 of the present act,

which relates to the same subject, these persons are referred to as "aliens."

The same change was made as between Section 2 of the Act of 1893, which related to these lists or manifests, and Section 13 of the present act relating to that subject.

Again, Section 4 of the Act of 1893, relating to the failure to enter names on the manifests, refers to the names of "alien immigrants," while Section 15 of the present law, which treats of the subject, refers to "all aliens."

Again, a similar change was made as between Section 8 of the Act of 1891 and Section 16 of the present act relating to inspection.

And then again a similar change occurs as between Sections 8 of the Act of 1891 and Section 18 of the present statute.

Whatever significance this change has in one case it must have in the others, and if by dropping the word "immigrant" in Section 18 Congress intended that the Immigration Law shall apply to *bona fide* seamen, then it follows that there has been a similar change of law wherever else the change has occurred in the statute. But an examination of the various provisions of the statute (and this has been made) shows that such a change would involve absurdity and injustice which Congress cannot have intended.

An examination of the Act of 1903 will also show that it was intended to be a codification of the Immigration Laws which had previously existed and the Congressional history of the act (see Subdivision D of this point below) shows that

those who framed it distinctly asserted this to be its purpose.

The codification of statutes differs radically from the amendment of statutes, for one is a collecting while the other is a changing. In making any codification, minor changes of phraseology ordinarily occur in the interest of brevity and consistency, but a codification ought not to be construed as a radical change from previous law unless the intention to make the change clearly appears.

The rule on this subject was stated by Chief Justice Spencer in New York State in 1805 thus:

> "Where the law, antecedently to the re-
> "vision was settled, either by clear expres-
> "sions in the statutes, or adjudications on
> "them, the mere change of phraseology shall
> "not be deemed or construed a change of the
> "law, unless such phraseology evidently pur-
> "ports an intention in the legislature to
> "work a change."
>
> *Taylor* v. *Delancey*, 2nd Caine's Cases, 143, 151.

That rule was repeated and followed by Chancellor Kent in 1823.

> *Godell* v. *Jackson*, 20 Johnson, 693, 722;

and by the Circuit ~~this~~ Court in the Louisiana Lottery Cases.

> *U. S.* v. *Dauphin*, 20 Fed. Rep., 625, 628.

It is true that in the Immigration Act of 1903 there was some amendment, and this is generally true of a codification. But,as will hereafter appear,

the framers of the act expressly explained that the chief purpose of the act was to effect a codification, and they explained with care the changes which they intended to make, as will appear in Subdivision D of this Point.

The principle declared by this Court in *Holy Trinity Church* v. *U. S.*, and the rule laid down by the Federal Courts in *U. S.* v. *Burke* and *Moffitt* v. *U. S.* (*supra*) to the effect that immigration statutes "should be construed as a whole "and not by selecting particular words or sen-"tences and interpreting them according to their "strict letter" requires that the change of phraseology from "alien immigrant" to "alien" in this 18th Section of the Act be interpreted as it must be interpreted where similar changes are made in other sections of the Act, and that the word "alien" in Section 18 shall have no other or different significance than the same word in other sections. Following this rule of construction, it cannot now be held that the change shows an intention to include *bona fide* seamen under Section 18, for it is impossible that that should have been intended where the changes had been made throughout the Act.

D.

Immigration Statutes which existed prior to 1903 had not applied to bona fide seamen, and it appears from the Congressional History of the Act of 1903 that Congress did not then intend to change the law on that subject.

I.—*The early Immigration Statutes did not apply to seamen.*

In 1891 a case arose in the Circuit Court of the Eastern District of Louisiana, where the immigration authorities took proceedings against the captain of a British steamer for the desertion of a seaman. The deserter had been a stowaway on the steamer on her voyage from Liverpool to New Orleans, but when discovered was put on the ship's articles and served as a member of the crew until the vessel arrived at New Orleans, where he deserted. It was held that he was a seaman, and that being such, the Immigration Statutes did not apply to the case.

U. S. v. *Sandrey,* 48 Fed Rep., 550.

A similar question arose in 1899 in *U. S.* v. *Burke* (99 Fed. Rep., 895), and the exhaustive opinion which Judge Toulmin then rendered appears to have settled the law, for no dissent from his views on this subject appears in any reported case.

In the *Burke* case, a seaman who had once deserted and had been returned to the ship as an

alien pauper immigrant, deserted a second time and the master of the vessel was fined $300 for failing to keep him aboard, and clearance was refused until the fine was paid. The master accordingly applied for a writ of mandamus to compel the issuance of clearance and his application was granted, the decision of the Court being that, "The "immigration laws have no application to alien "seamen who constitute the *bona fide* crew of a "vessel trading in the ports of the United States."

The statute construed in the *Burke* case was Sec. 10 of the Immigration Law of 1891, which provided,

> "That all aliens who may unlawfully come "into the United States shall, if practicable, "be immediately sent back on the vessel by "which they are brought in" * * * "and "if any master, agent, consignee or owner of "such vessel shall refuse or receive back on "board the vessel such aliens, or shall neg-"lect to detain them thereon, or shall refuse "or neglect to return them,"

he shall be punished by fine and the vessel shall not have clearance while the fine is unpaid.

Although that statute expressly referred to *"all aliens,"* it was thus held that these words did not include *bona fide* seamen.

The Court said (p. 896):

> "The legislation contained in the various "statutes that have been passed relating to "immigration is clearly directed against the "immigration into this country of certain "classes of persons who come in with the in-"tent to enter into and become a part of the "mass of its citizenship or population. Im-"migration is defined to be the entering into "a country with the intention of residing in

"it. The earlier statutes merely prohibit "contract laborers being brought in. The "later ones prohibit the bringing in of immi- "grants,—persons who come into this coun- "try with the intention of remaining, of fix- "ing a residence here,—and who are calcu- "lated to become a charge upon the country, "or who are unfit, on account of moral char- "acter, previous conviction of crime, or dis- "ease, to be admitted as citizens."

The foregoing portion of the opinion in the *Burke* case was quoted in full and with approval by the U. S. Circuit Court of Appeals for the Ninth Circuit in *Moffitt* v. *U. S.*, 128 Fed. Rep., 375.

In the *Moffitt* case, which was an indictment under the same section, the Circuit Court of Appeals held that the section did not apply to an alien peddler who was carried off by mistake from a Mexican port and was brought to San Francisco.

In both the *Burke* and *Moffitt* cases, the courts refused to construe the words "all aliens" to include aliens who did not come within the spirit of the immigration laws and were not actual immigrants and both cases were largely based on the principles declared in *Holy Trinity Church* v. *U. S.* (143 U. S., 457).

This was the state of the law on this subject when the 57th Congress undertook the codification of the immigration statutes. An application of the immigration statutes to *bona fide* seamen would necessarily have a most disturbing effect on commerce, for it is a matter of common knowledge that our foreign commerce was then, and is now, conducted by vessels which are in the main offered and manned by aliens.

It cannot be supposed that Congress would not recognize this, or that the framers of the law were

ignorant of the fact that the Federal Courts had held that the existing statutes did not apply to *bona fide* seamen, for when the Act of 1903 was framed the Congressional Committees had the aid of the most experienced officers of the Bureau of Immigration. (Report to Senate of Committee on Immigration, 57th Congress, 2nd Session, Document No. 62, pp. 63, 207.)

The question now to be considered is therefore whether Congress in passing the Act of 1903 intended to change the law on this subject.

II.—*The Congressional history of the Immigration Act of 1903 shows that Congress did not intend that it should apply to bona fide seamen.*

The best means of discovering their intention is by studying the statute which they passed, and this has already been done.

The most that can be claimed by the Government here is, that the word "alien" has been used by Congress in a sense so broad that it may include *all aliens*, even alien seamen. If the study of the Act of 1903 has not served to answer this contention, it can only be because there is some uncertainty with respect to the intention of Congress in using these words.

If the words used in a statute leave the mind in uncertainty as to the intention of Congress, then it is proper and usual for Courts to look at the Congressional history of the statute to see what intention was expressed when the statute was being framed and discussed.

The Collector v. *Richards*, 23 Wall., 246, 258.

Blake v. *National Banks*, 23 Wall., 307, 316.

Jennison v. *Kirk*, 98 U. S., 453.
The Delaware, 161 U. S., 459, 472.

It is not necesary here to study that Congressional history in full, because the Chairman of the House Committee which had considered this bill brought the bill up before the House, and, in doing so, made a formal statement as to the purpose of the bill and the changes which it would make in the existing law. A study of that statement will show that it was not intended by the framers of the bill to change the existing laws by extending the immigration statutes so as to reach alien seamen.

The bill which, with certain amendments, became the Immigration of 1903, originated in 1902, in the House of Representatives (57th Congress H. R., 12199). It had been referred to the House Committee on Immigration and on May 21, 1902, Mr. Shattuck, Chairman of that Committee, moved that the House consider the bill in Committee of the Whole. (*Congressional Record*, 1st session, 57th Congress, Vol. 35, Part 6, page 5757.)

In introducing the bill Mr Shattuck made an elaborate and, evidently, carefully prepared, statement (pp. 5757 to 5765) of the conditions of immigration for which the law must provide. In this statement of the conditions to be dealt with nothing is said with respect to alien seamen.

Mr. Shattuck stated (p. 5764):

> "The principal object of the bill is to codify "in concise form all the legislation of this "character heretofore enacted from the act "of March 3, 1875, to the act of 1894, and to "arrange the legislation in regular order and "sequence according to the various specific "subjects dealt with in the bill.

"It is the object also of the bill to eliminate "from the laws concerning immigration all "those parts which have become obsolete as a "result of subsequent legislation and to "amend all portions of the laws which have "been found inadequate to accomplish the "plain purpose intended by them because of "judicial decisions and interpretations and "because of lack of authority for their admin-"istration."

Taking up the question of changes in the existing law made by the bill, Mr. Shattuck said (p. 5764):

"A summary of the more important "changes, additions, and improvements em-"bodied in this new bill may be appropriately "given here."

Then follows (pp. 5764 and 5765) a statement of these changes terminating with this sentence: *"The foregoing comprises briefly all the proposed "legislation that is essentially new in this act, that "is, all that is not already on the statute books, "and the entire codification is really and simply "a fuller application of the principle of existing "laws."*

But in this statement of changes *nothing whatever was said about alien seamen* or of any intention to make such a change in the immigration laws as is involved in the decision of the Courts below.

Section 18 of the Immigration Act was amended in the House (*Congressional Record*, volume 35, p. 5997), but there is no intimation that the statute was being extended to include *bona fide* seamen, and the amendment did not relate to that subject.

The same bill was introduced into the Senate with a report by the Committee on Immigration

(*Senate Report* No. 2119, Fifty-seventh Congress, first session) which states:

> "With the exception of certain features "which will be referred to further on in this "report, this measure is a re-enactment of "existing laws upon the subject of immigra-"tion.
>
> "The necessity for such re-enactment is "due in part to the fact that, as a result of "judicial decisions, as well as of adminis-"trative experience, the efficiency of such "laws to accomplish the evident purpose of "their enactment has been shown to be ma-"terially less than appeared to be the case "at the time of such enactment, and there-"fore a new expression of the legislative "will upon the subject of immigration has "become desirable. These laws are, besides, "scattered at wide intervals through the "Statutes at Large, and extend over a con-"siderable period of time; * * *
>
> "The new legislation presented in the act "is either amendatory of that in force or ad-"ditional thereto, and the facts and reason-"ing therefrom in support of it in each in-"stance will be given herein. *The absence of "comment on any portion of the measure in-"dicates that such portion is, either in terms "or in substance, existing law.*"

The report then takes up the various sections of the statute consecutively, commenting on any changes from pre-existing law that they embodied. The only comment on Section 18 of the law as it was passed (or 19 as it was when it came before the Senate) was:

> "The penalty imposed for improper or un-"lawful landing of any aliens, section 19, "adds a provision for the deportation of "aliens so landed."

In the Senate, Senator Penrose, in charge of the bill, said (volume 36, p. 97):

> "It is a codification of existing Treasury "regulations and law, * * *"

In speaking of the Head Tax provision, Senator Lodge said (volume 36, p. 99):

> "I will say that this bill of course is in- "tended to affect only immigrants, and it "seems to me that in order to make it clear "beyond a doubt it is better to use that "word."

Section 18 (Section 19 of the bill when it was before the Senate) was amended in the Senate, p. 107, but these amendments were not directed towards enlarging the scope of that section to include *bona fide* seamen, nor was there any debate indicating such an intention.

The amendments seemed to be directed toward preventing a vessel bringing in immigrants from evading the law by disposing of its human cargo at some other place than "a port." The addition of the provision for deporting "aliens" landed in violation of this section indicates that only passengers were referred to by the word "aliens," as there was already in the U. S. Statutes a provision for the return of deserting alien seamen to their ships.

Mr. Fairbanks said, at p. 2805, vol. 36:

> "The bill is a codification mainly of exist- "ing laws. It embraces, among other things, "very important and necessary administra- "tive features.
>
> "What is there in the bill as it stands now "that is not found in some form upon the "Statute books to-day.? The larger part of "it is essentially a codification of existing "law."

Mr. Tillman.—"Will the Senator briefly "explain just what changes have been made "in existing law? I do not want a synopsis, "but I want a general outline of the most "essential alterations, if there are any. "Now, if this is a mere codification, it is not "necessary."

Mr. Fairbanks.—"I will say——"

Mr. Tillman.—"I want those essential "changes. Of course I know there is a head "tax, which is not the present law."

Mr. Fairbanks.—"Yes, that is increased "from $1 to $2." * * *

"There are no essential changes from the "present law. There was a very important "change proposed by the application of an "educational test, but, as I have stated, an "amendment has been adopted striking out "that provision. That was a very essential "change from the exisiting immigration laws. "There are no radical or substantial changes "in the bill from the existing laws which "are found scattered through many volumes "of the statutes" (Vol. 36, p. 2806).

Mr. Tillman.—"I would rather vote for a "bill that contained the educational qualifi- "cation for immigrants." * * *

Mr. Lodge.—"It has been withdrawn and "it is not in this last bill. We can save the "administrative features, which are of great "value, and which the Department desires "because it improves the method of adminis- "tration. That is all that remains in the "bill."

This subject of the Congressional history of the Immigration Act of 1903 has been considered an important one in the arguments had below. Counsel for the petitioner have had a careful examination made of the Congressional Record and of re-

ports of committees and counsel for the government have apparently made a similar examination, for a considerable portion of the briefs filed in the Circuit Court of Appeals related to that history. It is believed by counsel that as a result of this study all facts in the history of the Act which are here material are presented by the briefs filed.

It is no answer to this to say that Congress cannot have intended to leave open a door by which immigrants can come in and avoid inspection by merely claiming to be members of a crew and working their passage over. The law on that subject is, and was before 1903, that where the enrolment as a member of the crew is a mere colorable device to evade the immigration laws the person attempting to practice the device is an immigrant and must be treated as such (*U. S.* v. *Burke*, 99 Fed. Rep., 895). There was nothing in the statutes before 1903 which prevented the inspection, and, if necessary, the exclusion of such persons, and there is nothing in the present statute which prevents it. But any reference to such devices to evade the laws can only serve to confuse the simple issue which is here presented. For here we have only to consider the case of a *bona fide* seaman.

It is important in this connection to note the attitude of Congress toward this subject as indicated by the phraseology of the Immigration Act passed February 20, 1907, which took the place of the previous Act of 1903.

Almost every section of the Act of 1903 was amended in 1907, and a decided change of phaseology was made in Section 18, but neither in Section 18, nor in any other section, was any language whatever employed making the law applicable to seamen, or in any way mentioning seamen.

The indictment in this case was found in December, 1905 (p. 5), and it will appear from the motion papers on which the writ of certiorari and the motion to advance were granted in this case that a number of other cases have been brought in the Federal Courts under Section 18 based on the indictments for the desertion of seamen. It cannot be assumed that the immigration authorities, who co-operated with committees of Congress in the amendments incorporated in the Act of 1907, were not aware of the pendency of these cases, and if there had been on the part of Congress any intention to make our immigration laws apply to seamen, the obvious way to deal with this question would have been to amend the act accordingly, but no amendment whatever on that subject was made. (See Immigration Act of Feb. 20, 1907.) Nor so far as appears was any such change proposed or referred to as desirable or intended.

E.

The hardship and injustice which such an interpretation would inflict on foreign seamen and the owners and masters of foreign and domestic ships are so obvious and the embarrassment which it would cause to both foreign and domestic commerce so serious that this consideration alone should be sufficient to exempt *bona fide* seamen

from the operation of the Act if there were really any serious doubt on the construction of the Act itself or of the intention of Congress.

THIRD POINT.

To hold that Congress intended to make Section 18 of the Immigration Act of 1903 apply to desertion of bona fide seamen involves attributing to Congress the intention to hold a ship-master responsible as a criminal for failing to prevent the unavoidable, and the intention to punish him for the act of another by which he himself is the immediate sufferer.

If Section 18 had in its terms expressly referred to seamen, then the question whether its provisions were just or unjust would have been a legislative and not a judicial question. But the fact that an opinion was filed in the Circuit Court of Appeals dissenting from the views of the majority on this question of construction, shows at least that there is a question as to what Congress intended if the preceding points have not served to show this. And there being such a question as to the intention of Congress, it is proper for this Court to consider what the practical effect of the Act will be, so as to avoid attributing to the Congress the intention to pass an unjust statute. The

attention of the Court is accordingly invited to this branch of the subject.

A.

It was proved in this case that it is impossible to prevent all desertions, no matter what precautions might be taken by the master, though this is a fact so well known as probably to require no proof.

It is probably a fact that in most cases the same desire for change which leads men to select the life of a seaman also leads them to change from one vessel to another, or to yield temporarily to enticements ashore in disregard of their obligations.

Precautions have little, if anything, to do with the prevention of desertion unless legislatures and courts are prepared to permit seamen to be at all times imprisoned on vessels, and unless under those circumstances men can be found who will ship as seamen. This fact is well shown by the experience in the United States Navy, for, considering the efficiency and the need for efficiency which exists in the government service, and the difficulty in keeping our naval vessels properly manned, it cannot be supposed that officers of the navy fail to adopt due precautions to prevent desertions from their crews.

So far as penalties may aid in preventing desertion, the Federal Statutes provide that a deserter from the navy may suffer the punishment of death, or such other punishment as a court martial may adjudge (U. S. Revised Statutes, Title XV, Sec. 1524); that such a deserter shall forfeit his right to citizenship (Title XXV, Sec. 1998), and shall forfeit any wages deposited with the paymaster (Title XXV, Sec. 657).

So far as practical conditions are concerned, desertions may be more readily prevented in the naval service than in the case of merchant vessels, for naval vessels either lie at anchor where the men cannot leave the ship without detection, or are docked at a Navy Yard where the exits are guarded.

The inefficiency of these statutory penalties and practical safeguards, so far as the prevention of desertions are concerned, will appear in the last published report of the Chief of the Bureau of Navigation of the Navy Department for the fiscal year ending June 30, 1906, which states (see pp. 34 and 35 of Report) that out of a total number of 44,222 listed men in the navy, 3,998, or something more than 9 per cent. of the whole number, deserted during the year.

As to the causes of desertion, this report states (pp. 31 and 32):

> "The Bureau adheres to its conviction pre-
> "viously expressed on this subject that the
> "greater number of desertions are due to
> "qualities innate in a certain proportion of
> "the men themselves—principally the desire
> "for change, which is shown by the same rov-
> "ing spirit in unskilled shore occupations, and
> "partly due to either disappointment in not
> "realizing a roseate conception of naval life,
> "or from temporary dissatisfaction with ex-
> "isting conditions of the service."

And on page 34:

> "The closest scrutiny of available records
> "fails to show any specific cause for deser-
> "tion; vessels where desertion might be ex-
> "pected to be least have during the past year
> "shown the greatest number, and other ves-
> "sels where the accommodations and condi-

"tions are not favorable to contentment show "a gratifyingly small number of desertions."

It is a matter of universal experience that desertions at large ports cannot be prevented and never have been prevented. The facts here present a typical case of desertion and if the petitioner is now to be punished criminally, he will be punished for having failed to do the impossible. If this was the intention of Congress and if such a statute is to be enforced, then every ship master who brings a large steamer from a foreign port to one of our ports will probably subject himself to a harassing trial and expose himself to a degrading punishment.

B.

Aside from the fact that all desertions cannot be prevented, there is an element of injustice in punishing the captain for the desertion of a *bona fide* seaman.

The master of a ship cannot take charge of the ship, either in port or at sea, without a crew, and a desertion is primarily an injury to the master because it deprives him of a necessary helper. Can it be that Congress intended that a master should be punished as a criminal because a seaman has injured him and broken his contract?

If there were any evidence of connivance on the part of the master with any scheme to evade the immigration laws by accepting immigrants as seamen and by then allowing them to escape, a different situation would be presented, but there is no element or suggestion of that nature in this case.

The only wrong that was done in this case was done by the alien seaman and was done after he

had left the ship and was somewhere in the city (fol. 52). If this alien seaman had not changed his mind after he was ashore and if he had carried out his original intention and had gone back to the ship, the petitioner would not have been indicted for giving him shore leave. On the rulings below the petitioner was indicted and convicted as a criminal because this alien carried out a wrongful purpose which he formed after he had left the ship and was entirely beyond the jurisdiction of the Captain.

Even if the alien in this case had formed the intention of deserting before he left the ship, the only wrong done would have been the wrong done by the deserter, and if the master is punished for this wrong, then one man is punished for the wrong which another man has done. Can Congress have intended this?

FOURTH POINT.

The existence of a number of statutes passed by Congress expressly for the regulation of the affairs of seamen, including statutes relating to the return of deserters, indicates that Congress cannot have intended to pass a law not in harmony with those statutes, and that if Congress had intended the Immigration Law to apply to seamen it would at least have used language expressly providing to that effect.

A.

Merchant seamen probably receive more statutory protection and regulation in their various affairs than any other class of people engaged in a mercantile pursuit, for it seems to be recognized that seamen must be regarded as a roving and somewhat irresponsible class who require on the one hand special protection against imposition and on the other hand special laws to require them to perform their contracts.

Congress has accordingly passed a large body of regulations relating to seamen. These constitute an entire title (Title LIII of the Compiled Statutes), where, under the head of "Merchant Seamen", are contained seven chapters of statutes comprising 110 separate sections. These statutes created a special body of Federal officials (Shipping Commissioners) whose chief duty is to sup-

ervise the shipment and discharge of seamen and to protect them against imposition. They provide with great particularity as to the shipment of seamen, as to the terms of shipping articles (the forms of which are prescribed), as to the duration of the voyage, as to shipment in foreign ports, as to the wages and effects of seamen, as to their discharge, as to controversies between master and crew, as to the seaworthiness of vessels, as to food, medicines, clothing and fuel for seamen, as to the return of seamen from abroad and the transportation of destitute seamen.

Then taking up the duties of the seamen, the statutes provide for the punishment of various offences, including desertion (Sec. 4596), for the reclamation of deserters (Sec. 4600) and prohibit the carrying of sheath-knives or the imposition of corporal punishment.

All of these statutes, as will appear by their own phraseology, relate expressly to seamen and only to seamen, and they indicate on the part of Congress a conviction that seamen, as a class, require special and express statutory protection and regulation. Where Congress has been at so much pains to create this body of laws, it cannot be that it could intend to make a different and conflicting body of laws (viz., the Immigration Laws) apply to seamen without at least using express language which should indicate such an intention.

B.

When it it is recognized, as it must be in this case, that the status of a *bona fide* seaman is involved, there is an element of absurdity involved

in the contention that the Immigration Act applies to such a seaman.

The whole machinery for detention and inspection contained in the Immigration Act is aimed to secure the deportation of inadmissible aliens. If this machinery must be applied to *bona fide* seamen, then the result of the working of these various laws for detentions and inspections may be that a seaman will be ordered to leave the port. But if he is a *bona fide* seaman, he will leave the port without any order to that effect—even if he deserts from one ship and then later ships on another, for it was proved in this case that the desertion of an ordinary seaman does not often result in his becoming a permanent resident of the United States, but that such deserters, as a rule, "have only landed temporarily and reship the first "available opportunity" (p. 13).

C.

The learned Circuit Judge who wrote the prevailing opinion in the Circuit Court of Appeals intimates that shore leave, which might properly be given to certain members of the crew, could not as properly be given to one "who was an unknown "alien of some other nationality than the ship "who was no sailorman, but merely a scullion or a waiter" (p. 48).

The deserter in this case testified that he shipped as a cook (p. 8), and it is obvious that in modern passenger steamships, cooks are most necessary members of the ship's company.

A seaman is one who is habitually employed at sea, and as the type of vessels has changed, the special occupation of seamen on these vessels

has correspondingly changed. The proportion of the crew who actually take part in the navigation of the modern steamship is very small, in fact, the use of mechanical appliances in most cases makes it possible for the officers to navigate the ship with little, if any, assistance from the crew. To restrict the application of our laws relating to seaman to such of them only as would have been regarded as "sailormen" as that word was understood in the days of sailing vessels, would be to exclude the vast majority of merchant seamen from the operation of those laws.

The section on definitions in Title LIII of the United States Compiled Statutes relating to merchant seamen from the operation of those laws "every person (apprentices excepted) who shall "be employed or engaged to serve in any capacity "on board of the same [that is, on board a vessel] "shall be deemed and taken to be a seaman." Section (4612).

Thus it has been held that the laws relating to seamen apply to cooks (*"James H. Shrigley"*, 50 Fed. Rep., 287; *Allen* v. *Hallet*, 1 Fed. Cas., 472), to engineers and their helpers (*Saylor* v. *Taylor*, 77 Fed. Rep., 476) and to coopers carpenters and clerks on steamboats (*Holt* v. *Cummings*, 102 Pa. St., 212; *U. S.* v. *Thompson*, 1 Sumn., 168).

FIFTH POINT.

The application of the immigration law to deserting British seamen would prevent the enforcement of treaty obligations of the United States and of the provisions of the statute passed by Congress for the purpose of enforcing such treaties.

This subject of the return of deserting seamen has been deemed of sufficient moment to require a special treaty between the United States and Great Britain, and the *Slavonia* being a British vessel, members of her crew must be regarded as British subjects while so employed.

There was concluded on June 3, 1892, between the United States and Great Britain a special treaty which related only to "The Recovery of "Deserters from Merchant Vessels." In this treaty after reciting that the contracting governments "are desirous to make provision for the "apprehension, recovery and restoration of per- "sons who may desert from merchant vessels of "their respective countries while in the ports of "the other country," it was provided that consuls, and consular officers of the contracting parties residing in the dominions, or possessions, or colonies of the other "shall have power to require "from the proper authorities the assistance pro- "vided by law for the apprehension, recovery "and restoration of seamen who may desert from "any ship belonging to a citizen or subject of "their respective countries, while in the ports of "the other country."

This treaty brought deserting British seamen

within the reach of Section 5280 of the United States statutes, which provided that "On appli- "cation of a consul or vice-consul of any foreign "government having a treaty with the United "States stipulating for the restoration of sea- "men deserting, made in writing," and containing certain statements, and on production of the ship's register, or other official document, showing that the deserter had belonged to the crew, "it shall be the duty of any court, judge, commis- "sioner of any circuit court, justice, or other "magistrate, having competent power, to issue "warrants to cause such person to be arrested "for examination. If, on examination, the facts "stated are found to be true, the person arrested "not being a citizen of the United States, shall "be delivered up to the consul or vice-consul, to "be sent back to the dominions of any such "government, or, on the request and at the ex- "pense of the consul or vice-consul, shall be de- "tained until the consul or vice-consul finds an "opportunity to send him back to the dominions "of any such government."

This treaty and statute represent the compact between the United States and Great Britain as to the treatment of deserting seamen. The offence of deserting from a British ship is a violation of British law, involving various penalties including imprisonment (Merchant Shipping Act, 57 and 58 Vict. Ch., 60, section 221), and the offender must be returned to the British dominions whose laws have been violated, so that his case may be dealt with as those laws require.

It is important to observe that Sec. 5280 of the Statutes in carrying out the provisions of this and other treaties provides that the deserter shall

be delivered up to a Consul, to be sent back to the dominions of the foreign government. This is more than the mere return of the deserter to his ship, it contemplates that he shall be returned to the jurisdiction whose laws he has violated to be dealt with by those laws.

If the Immigration Act of 1903 applies to the desertion of *bona fide* seamen then, in this case and in many cases, its enforcement will prevent the carrying out of the obligations of the United States created by the treaty of 1892, and will prevent the enforcement of that treaty, as provided by Congress in Sec. 5280 of the United States Statutes.

This deserter was shipped at the port of Fiume, in Hungary, and if the Immigration Act of 1903 applies to seamen, then it required him to be taken back to the country whence he came, viz., Hungary (Sec. 19, Immigration Act of 1903). If this were done, it would be impossible to carry out the policy and provisions of the treaty of 1892 and of Section 5280 of the Statutes, for no punishment under the British law could be imposed on a deserter after his return to the Hungarian port.

In some cases a deserter if deported to the country from whence he came, will happen to be brought within the reach of the laws which he has violated, but this circumstance will vary with different cases, and it must be apparent that the Immigration Act, which merely aims at the *exclusion* of certain persons, will frequently conflict with the previous law and treaty provisions as to desertion, the object of which is to secure the *return of the offender to a place where his offence can be punished.*

Congress may undoubtedly pass a statute con-

trary to the provisions of an existing treaty, but it cannot be that a statute will be construed to be inconsistent with a treaty unless that intention is clearly expressed in the statute or *necessarily* implied from its provisions.

SIXTH POINT.

The interpretation of Section 18 by the Court below makes an act criminal which was not criminal when performed.

The substance of the charge of the Trial Judge was that it was not illegal for a master to allow a seaman shore leave under proper circumstances, but that, if the seaman after getting ashore changed his mind and determined to desert, that then the captain was guilty of a misdemeanor under Section 18.

The Trial Judge thus adopted the obvious conclusion that a master must give shore leave in a proper case, and the facts proved here show that Ramadonawich was properly entitled to shore leave when he left the ship. So *the act or permission of the petitioner which enabled this seaman to leave the ship was a legal act* on his part, but he was convicted because the Trial Judge construed the statute to mean that he committed a misdemeanor when the seaman *subsequently* changed his mind and decided to desert.

The essence of the objection to such a construction of this statute is that it punishes a person as

a criminal for an act which was not criminal *when performed.*

Chief Justice Marshall, in 1810, defined an *ex post facto* law thus:

> "An *ex post facto* law is one which ren-
> "ders an act punishable in a manner in which
> "it was not punishable when it was commit-
> "ted."
>
> *Fletcher* v. *Peck,* 6 Cranch, 87, 138.

Later definitions have been to the same effect as

> "An *ex post facto* law is one which im-
> "poses a punishment for an act which was
> "not punishable at the time it was commit-
> "ted. * * *"
>
> *Burgess* v. *Salmon,* 97 U. S., 381, 384.

And later this Court quoted with approval a charge given to a jury by Judge Washington, in the Circuit Court, where he charged that

> "An *ex post facto* law is one which, in its
> "operation, makes that criminal which was
> "not so at the time the action was performed;
> "or which increases the punishment, *or, in*
> *"short, which, in relation to the offense or its*
> *"consequences, alters the situation of a party*
> *"to his disadvantage."*
>
> *Kring* v. *Missouri,* 107 U. S., 221, 228.

The substance of these decisions is that an act which was legal *when performed* must not be made illegal *after it is in the past* and beyond recall. But this is precisely the effect of the decision below in this case.

The clause of the Constitution prohibiting *ex post facto* statutes has generally been considered in cases, and may be, as a prohibition, limited to cases, where the statute itself was passed after the act was performed, but the reason for that prohibition is that an act which was legal when performed ought not afterwards to be declared a crime, and this principle is violated by the construction adopted by the Court below, and the question is whether a construction, giving the act such an effect is a *necessary* construction.

It is respectfully urged that in the presence of any uncertainty as to the intention of Congress, an intention ought not to be attributed involving the result that the statute will violate the essential principle contained in the clause of the Constitution against making an act criminal which was not a criminal act when performed.

SEVENTH POINT.

The Immigration Bureau has not construed the Act of 1903 as applying to alien seamen.

It has been the uniform practice of this Court in interpreting the ambiguous expressions of a statute to examine into and give weight to the construction actually put upon the statute in question by the executive department and officers actually enforcing it. This was done in the following cases:

Edwards, Lesee v. *Darby,* 12 Wheat, 206;
U. S. v. *Gilmore,* 8 Wall., 330;
Smythe v. *Fiske,* 23 Wall., 374, 382;
U. S. v. *Moore,* 95 U. S., 760, 763;
Brown v. *U. S.,* 113 U. S., 568, 571;
U. S. v. *Philbrick,* 120 U. S., 52, 59;
U. S. v. *Hill,* 120 U. S., 169, 183;
Schell's Exrs. v. *Fauché,* 138 U. S., 562;
U. S. v. *Ala. R. R. Co.,* 142 U S, 615, 621.

Under these authorities it was proper for the defense to offer proof as to the construction of this statute which the Bureau of Immigration had adopted and declared, and the Court below erred in excluding the extract from the last official report of the head of the Bureau on this subject (p. 8).

The Immigration Bureau has formally put itself on record in this matter, for in the last official annual record of the Commissioner General he recommends that new legislation be passed on this subject as follows:

> "Legislation should be adopted to check "violations of the immigration laws by pro- "fessed seamen, thus taking advantage of "their status acquired under one law to es- "cape the operation of another. Such legis- "lation should impose a sufficient penalty up- "on masters of vessels for signing other than "*bona fide* seamen upon their crew lists, thus "enabling such pretended seamen to enter "this country without the examination made "of all other aliens by simply deserting after "arrival at our ports. Masters of vessels

"should be required to notify inspection of-
"ficers upon arrival and before departure
"from ports of this country, so that such of-
"ficers may be able to ascertain whether
"aliens brought thereon have departed, if
"inadmissible to the United States. The
"masters should also be held accountable for
"any alien seaman brought by them who, he
"is informed by an immigrant inspector
"should be retained on board as an inadmis-
"sible alien, as they are for the escape of
"alien passengers denied a landing."

If any one is entitled to speak for the Bureau of Immigration, it is the head of that Bureau, and he is thus on record as recommending a *change* in the laws so that they may be extended to reach in a modified form "professed seamen."

It will also appear by the testimony of Mr. Govern, law clerk of the Bureau for the Port of New York, where most immigrants arrive, that the Department does not examine those who are *bona fide* members of the crew of merchant ships (p. 6); that it does not require the names of alien members of a crew to be entered on the lists or manifests delivered to the Immigration Department (p. 8), and unless there is some circumstance which indicates that a person is not a *bona fide* seaman or indicates that he intends to leave at New York, the Bureau does not treat him as an alien immigrant under the present law (p. 6).

The object of offering proof as to the construction which had been placed on the Immigration Act by the Bureau of Immigration was to aid the Court in construing the law rather than to aid the jury in passing on any matters of fact. So far as the jury is concerned, it is perhaps not important to inquire whether or not this proof should

have been received, but it is important to note that the trial Judge expressly stated that he would give no weight to such evidence for the purpose of construing the Act.

As will appear from the record at page 7, the defendant's counsel was attempting to show by the cross-examination of an immigration official that the immigration authorities had not interpreted the word "alien" as used in the Immigration Act as referring to alien seamen. Upon the Court's objecting to this line of proof, counsel had argued that

> "In the discovery of the meaning of broad "or doubtful language of a statute, the inter- "pretation put on the statute by the execu- "tive department charged with the execution "of the statute has been constantly received "as giving weight to the interpretation" (p. 7).

The learned Trial Judge however stated that he would give such proof no weight in interpreting the statute (p. 7).

In *U. S.* v. *Ala. R. R. Co.*, 142 U. S., 615, 621, this Court said, construing a statute:

> "We think the contemporaneous construc- "tion thus given by the executive depart- "ment of the government, and continued for "nine years through six different adminis- "trations of that department—a construc- "tion which, though *inconsistent with the* "*literalism of the act*, certainly consorts with "the equities of the case—should be consid- "ered as decisive in this suit. It is a set- "tled doctrine of this court that, in case of "ambiguity, the judicial department will lean

"in favor of a construction given to a statute "by the department charged with the execu- "tion of such statute."

(The italics are ours.)

As heretofore stated, the Immigration Law of February 20, 1907, has not changed the phraseology of the Act of 1903 in so far as it relates to the designation of aliens to whom the Act is intended to apply. It is important, therefore, to note that the Bureau of Immigration continues to regard the immigration statutes as not applying to *bona fide* seamen.

A long rule relating to seamen (Rule 22) was incorporated in the revised regulations made July 1, 1907, under the immigration laws. A copy of that rule is given in the appendix hereto. An examination of this rule will show at many points that the Bureau does not regard *bona fide* seamen as coming within the terms of the immigration statutes. In fact, subdivision (a) of that rule expressly states to this effect, where it provides that:

"Alien seamen who seek to land, in the reg- "ular course of their pursuit, with the *bona* "*fide* intention of departing as soon as prac- "ticable upon some outward-bound vessel, are "not to be held for examination touching their "right to land under the various acts regulat- "ing immigration into the United States, nor "shall the masters of the vessels upon which "they come to a port of the United States be "charged on their account with the head tax "prescribed by section I."

EIGHTH POINT.

The judgment of the Circuit Court and of the Circuit Court of Appeals should be reversed and the cause should be remanded to the Circuit Court with instructions to discharge the petitioner.

LORD, DAY & LORD,
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WILLIAM G. CHOATE,
LUCIUS H. BEEBE,
Of Counsel.

Appendix.

(See page 81 above.)

RULE 22. *Seamen.*—In view of the opinion of the Attorney-General of the United States of September 10, 1901 (23 Op., At. Gen., 521), immigration officials will make such an investigation of every vessel arriving at a port of the United States from any other than a mainland or continental port thereof as will enable them to ascertain the members of its respective crew who are aliens, as well as the intention of such alien members in seeking a landing.

(*a*) Alien seamen who seek to land, in the regular course of their pursuit, with the *bona fide* intention of departing as soon as practicable upon some outwardbound vessel, are not to be held for examination touching their right to land under the various acts regulating immigration into the United States, nor shall the masters of the vessels upon which they come to a port of the United States be charged on their account with the head tax prescribed by Section 1.

(*b*) Alien seamen who are discharged, or who have deserted their vessel at a port of the United States with any other object in view than departing as described in the next preceding paragraph (*a*) are in no respect to be distinguished, on account of their prior calling or occupation as seamen, from other aliens seeking admission to this country, either as regards collection of head tax on their account or as respects the examination and determination of their right to remain, under the various acts regulating immigration.

(*c*) All aliens other than *bona fide* seamen signed on the ship's articles of any vessel and landing at a port of the United States shall be examined and in all respects regarded as alien passengers on account of whom the head tax should be collected, and shall be admitted or returned to the countries whence they came in accordance with the laws and regulations governing immigration.

(*d*) If, upon the arrival of a vessel from a foreign port, it is discovered that any alien member of the crew of such vessel is ill or disabled to such an extent as to make it obligatory upon the master of the vessel, under the navigation laws of the country to which the vessel belongs, to return the seaman to the country where he embarked, immigration officials will confer with the master and with the consular representative of the country to which the vessel belongs, with the object of perfecting plans by which the master may be able to observe the laws of his own country without violating the immigration laws of the United States. If the disabled seaman relinquishes his calling, he will be treated like any other alien seeking admission to the United States, and if, upon being brought before a board of special inquiry, his rejection is ordered, the master of the vessel shall be required to return him by such vessel, or at his own expense, to the country where he embarked. If the seaman does not relinquish his calling it will be permissible for him to pass through the United States in transit to the country where he embarked by the most expeditious and direct route; provided that if he is suffering with a dangerous or a loathsome contagious disease, or with tuberculosis, or is in such physi-

cal or mental condition as to render him a person likely to become a public charge, arrangements are made for his proper guarding and care while passing through the country, and a sufficient sum to defray the expenses thereof is furnished by the master of the vessel. This being a provision made in the interest of trade and because of the peculiar position occupied by seamen under principles of international comity, immigration officials will exercise care to insure a thorough understanding with all parties concerned that violations of the immigration laws may be provided against and that the spirit of foreign laws may be observed.

(*e*) To facilitate these objects, every alien seaman desiring shore leave, or to come ashore for the purpose of reshipment in another vessel, or for any purpose in pursuit of his calling, may apply to the commissioner of immigration or to the immigration officer in charge at the port of arrival for a certificate upon a form prescribed by the Commissioner-General of Immigration, which shall entitle him to shore leave or the right to transship or pursue his calling without further inspection or examination.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

WILLIAM F. D. TAYLOR, PETITIONER,
v.
THE UNITED STATES. } No. 238.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is before the court on a writ of certiorari to the Circuit Court of Appeals for the Second Circuit.

The petitioner was indicted in the Circuit Court for the Southern District of New York for violation of section 18 of the immigration act of March 3, 1903 (32 Stat., 1213, 1217), which reads as follows:

THE STATUTE.

> SEC. 18. That it shall be the duty of the owners, officers, and agents of any vessel bringing an alien to the United States to adopt due precautions to prevent the landing of any

> such alien from such vessel at any time or place other than that designated by the immigration officers, and any such owner, officer, agent, or person in charge of such vessel who shall land or permit to land any alien at any time or place other than that designated by the immigration officers shall be deemed guilty of a misdemeanor and shall, on conviction, be punished by a fine for each alien so permitted to land of not less than one hundred nor more than one thousand dollars, or by imprisonment for a term not exceeding one year or by both such fine and imprisonment, and every such alien so landed shall be deemed to be unlawfully in the United States and shall be deported, as provided by law.

The petitioner was tried before a jury and found guilty and sentenced to pay a fine of $500, or to be imprisoned in the Kings County Penitentiary until such fine was paid.

On writ of error the judgment of conviction was affirmed by the Circuit Court of Appeals, and the case is now here for review.

The petitioner was master of the steamship *Slavonia* of the Cunard Line (Record, p. 5), on which one Elias Ramadonawich shipped as a cook (p. 8), and which arrived at the port of New York on October 10, 1905 (p. 5). Ramadonawich had shipped at Fiume, Hungary, for the round trip from Fiume to New York and back to Fiume, at a wage of £2 a month (pp. 10–11).

On the evening of the day on which the ship arrived in New York, at about a quarter before six, before the

day had ended but after it had started to become dark, he left the steamer by the gang plank and went ashore. Nobody interfered with his leaving the ship. Neither the defendant nor any officer on the ship gave him any instructions regarding his right to go ashore in the port of New York, nor did he see any watchman at the gang plank (p. 9). He left the ship with the intention of returning, but after he got ashore decided to stay (p. 11). The immigration officers first learned of his presence in the country from a letter dated November 10, 1905, a month after he had left the ship, written by the superintendent of the Flatbush Poorhouse, Flatbush, N. Y. (p. 6), of which the alien was an inmate. From the poorhouse he went to the Metropolitan Hospital, whence he was taken to Ellis Island on November 28 (p. 10).

The rules in regard to shore leave were that all members of the crew whose behavior had been good should have shore leave in the evening. These instructions were given to the chiefs of each department by Captain Taylor, who testified that he was unable to say personally whether such instructions reached Ramadonawich. The rules relating to regulation of shore leave were not printed on the ship in the Hungarian language; the captain required no issuance of a ticket of leave or card showing that the holder had to go ashore (p. 18); no book was kept in which the names of the crew who went ashore were entered, and the only track he kept of his crew was by means of a rough record in the hands of the heads of the different departments (p. 19). It does not appear that any

guard was placed at the gangway until after the final muster on the morning of sailing, when no shore leave whatever was permitted (p. 22).

On the same trip on which Ramadonawich deserted it appears that twenty-two other alien seamen left the ship in the port of New York and did not return to it, under conditions similar to those in the case of Ramadonawich (p. 18).

It further appears that the desertion of Ramadonawich was never reported to the authorities at Ellis Island, and no steps were taken either by application to the British consul or in any other way to procure his arrest (p. 20).

On previous voyages Captain Taylor had had desertions, but had made no changes in the precautions to prevent them (p. 20).

Mr. Vernon H. Brown, agent for the Cunard Steamship Company at New York, testified that it almost invariably happened that there were desertions when a steamer arrived at the port of New York (p. 12).

The only evidence tending to show that any restraint was put upon the movements of Ramadonawich was that under his shipping agreement made at Fiume his wages for the time consumed in the round trip were not to be paid until he returned to that port (p. 16). At the time of his desertion there was due him between $5 and $6 for eighteen days' wages (pp. 10 and 11).

POINTS AT ISSUE.

The points at issue are raised by exceptions to the denial of the motions of the defendant in the trial court to set aside the verdict, and for a new trial and in arrest of judgment, and by exceptions to certain of the rulings of the trial judge on the admission and exclusion of evidence, and exceptions to certain portions of the charge to the jury, and of the court's refusal of certain requests to charge made by the defendant.

The principal issue involved is: Does section 18 of the act of March 3, 1903, require steamship officers to use "due precautions" to prevent alien members of their crews from permanently leaving their ships and remaining in the United States?

ARGUMENT.

The alien in this case, who was a member of the crew of the *Slavonia*, left the ship without interference from anyone and remained at liberty in the United States from the 10th of October until the 10th of November, when his presence was accidentally discovered by the immigration authorities at Ellis Island. In spite of the fact that he had been absent from the ship for one week prior to her sailing from the port of New York, no notice of any kind had been sent to the immigration authorities, and apparently the same is true of the twenty-two other desertions that occurred on the same trip. All alien seamen were allowed to go ashore without regard to whether any one of

them was within a class excluded by the immigration laws and for that reason or any other reason subject to special temptation to remain in the country. Insufficent precautions were taken to see that Ramadonawich came back to the ship, unless the desire to get the very small sum of money due him could have influenced him to return.

The entire conduct of the steamship company and of the defendant personally seemed to ignore any obligation on their part either to prevent the desertion of alien seamen or to cooperate with the immigration authorities in seeing to it that such seamen as did escape should be apprehended.

The petitioner contends that section 18 of the act of 1903 has no application to alien seamen, but the Government insists that the whole letter and spirit of the immigration laws show clearly that it was the intention of Congress to include all aliens of whatever class who for any reason were regarded as undesirable additions to the population of the country.

The evidence in this case shows how wide a loophole for evasion of the law would be provided if alien seamen were excepted from its provisions. And it further appears from the record that hardly a ship arrives in the port of New York from which there are not desertions. On the very trip on which Ramadonawich escaped, twenty-two other members of the crew left the ship permanently.

It can hardly be presumed, taking into consideration the language of the statute, that Congress

intended to leave open this avenue by which persons belonging to the excluded classes might enter the country.

The Government is unable to see that the rule for which it contends imposes any undue hardship on the agents or officers of steamships. It does not make the captain an insurer. It merely asks that he shall take "due precautions" to prevent the desertion of alien seamen while his ship is in port.

In the case at bar the matter was left to the jury under appropriate instructions, and the jury found that "due precautions" had not been exercised.

In spite of the fact that the petitioner contends that the law does not apply to alien seamen, in his brief submitted to the Circuit Court of Appeals he states that "It must be remembered that the case of aliens who are not bona fide seamen but who come to this country really for the purpose of immigrating into it is not here involved. It has always been the law that such persons are immigrants and that the law as to immigrants applies to them."

The admission that the law in certain instances applies to properly articled seamen is utterly inconsistent with the whole theory on which petitioner's argument is based. It is impossible to justify such an exception on any principle.

The Government submits the following points in this brief:

FIRST POINT.

The construction of section 18 of the act of March 3, 1903, asked for by the respondent, has been directly upheld, not only by the courts below in this case, but in the following similar cases, all of which are printed in full in the Appendix of this brief.

United States v. *Schulz*, Circuit Court, Eastern District of New York, Thomas, J., September 23, 1904. (App., p. 47.)

United States v. *Krech*, District Court of New Jersey, Lanning, J., February 3, 1905. (App., p. 51.)

United States v. *Cuppers*, District Court of New Jersey, Lanning, J., May 11, 1906. (App., p. 66.)

United States v. *Brandt*, District Court of New Jersey, Cross, J., May 15, 1906. (App., p. 75.)

United States v. *Frank Waterhouse Company*, District Court, Western District of Washington, Hanford, J., January 19, 1907. (App., p. 92.)

United States v. *Hill*, District Court, Eastern District of Pennsylvania, Holland, J., September 18, 1907. (App., p. 82.)

The only case arising under this section of the statute which has been decided adversely to the contention of the Government, so far as we are aware, is that of *United States* v. *Neil Macdonald*, decided in the Circuit Court of the United States in the Eastern District of Louisiana, now pending on writ of error before this court. The opinion in this case is very short, and seems to indicate that Judge

Saunders overlooked the change in the previously existing law made by the act of March 3, 1903. The opinion does not seem as persuasive as those handed down in the other cases which have been cited.

SECOND POINT.

It is undeniably true that the facts proved fall within the letter of section 18 of the act of March 3, 1903.

There is uncontradicted evidence to the effect that the plaintiff in error was an officer of the *Slavonia*, which was a vessel bringing Ramadonawich, an alien, to the United States. The evidence also shows that Ramadonawich had never been in the country before. Moreover, the jury found, and the record shows, that the plaintiff in error, failed to adopt "due precautions to prevent the landing of such alien from such vessel at a time or place other than that designated by the immigration officers." It therefore follows that he permitted the alien so to land, and according to the letter of the statute, is clearly guilty of the offense denounced by the act.

THIRD POINT.

The legislative history of the act indicates that it was the intention of Congress to include all aliens within the provisions of section 18 of the act of March 3, 1903.

A. *The act of 1903 was not a mere codification of laws previously existing. The word "immigrant" was omitted wherever it was found in the text of earlier acts for a deliberate purpose.*

Section 18 of the act of March 3, 1903, was designed to accomplish the same general purposes as section 8

of the act of March 3, 1891, but the later section was deliberately made more comprehensive. The section of the act of 1891, referred to, reads as follows:

> SEC. 8. That upon the arrival by water at any place within the United States of any *alien immigrants* it shall be the duty of the commanding officer and the agents of the steam or sailing vessel by which they came to report the name, nationality, last residence, and destination of every *such alien*, before any of them are landed, to the proper inspection officers, who shall thereupon go or send competent assistants on board such vessel and there inspect all such aliens, or the inspection officers may order a temporary removal of such aliens for examination at a designated time and place, and then and there detain them until a thorough inspection is made. But such a removal shall not be considered a landing during the pendency of such examination. The medical examination shall be made by surgeons of the Marine-Hospital Service. In cases where the services of a Marine-Hospital surgeon can not be obtained without causing unreasonable delay, the inspector may cause an alien to be examined by a civil surgeon, and the Secretary of the Treasury [Secretary of Commerce and Labor] shall fix the compensation for such examination. The inspection officers and their assistants shall have power to administer oaths and to take and consider testimony touching the right of such aliens to enter the United

States, all of which shall be entered of record. During such inspection after temporary removal the superintendent shall cause such aliens to be properly housed, fed, and cared for, and also, in his discretion, such as are delayed in proceeding to their destination after inspection. All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury [Secretary of Commerce and Labor]. It shall be the duty of the aforesaid officers and agents of such vessel to adopt due precautions to prevent the landing of *any alien immigrant* at any place or time other than that designated by the inspection officers, and any such officer or agent or person in charge of such vessel who shall either knowingly or negligently land or permit to land *any alien immigrant* at any place or time other than that designated by the inspection officers shall be deemed guilty of a misdemeanor and punished by a fine not exceeding one thousand dollars, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment.

The word "immigrant" was, then, struck out in section 18 of the act of 1903, and the same action was taken in section 12, formerly section 8 of the act of March 3, 1891; section 1, act March 3, 1893; section 13, formerly section 2, act March 3, 1893; section 17,

formerly section 6, act March 3, 1893, and from section 20, formerly act of October 19, 1888. The word had previously been struck out from the section defining the excluded classes. Section 2, which in its original form was section 5 of the act of March 3, 1875, provided that it should be unlawful for aliens of such classes to immigrate into the United States. *The word "immigrant," as describing the class of aliens with whom the law deals, has been eliminated throughout the act of 1903.* These changes in themselves indicate that the act of March 3, 1903, was not merely a codification, and when we come to consider its legislative history such claim appears manifestly untenable. In the report made by the Committee on Immigration of the Senate, which was quoted by petitioner in his brief in Circuit Court of Appeals (Senate Rep. 2119, p. 1, Fifty-seventh Congress, first session), it is stated:

> *With the exception of certain features,* which will be referred to further on in this report, this measure is a reenactment of existing laws upon the subject of immigration. The necessity for such reenactment is due in part to the fact that, as a result of judicial decisions as well as of administrative experience, the efficiency of such laws to accomplish the evident purpose of their enactment has been shown to be materially less than appeared to be the case at the time of such enactment, and therefore a new expression of the legislative will upon the subject of immigration as become desirable.

Representative Shattuc, chairman of the House Committee on Immigration, and introducer of the bill, stated:

> It is the object of the bill to eliminate from the laws concerning immigration all those parts which have become obsolete as a result of subsequent legislation, *and to amend all portions of the laws which have been found inadequate to accomplish the plain purpose intended by them because of judicial decision and interpretations* and because of lack of authority for their administration. (Fifty-second Congress, first session, vol. 35, 5764)

The report of the House committee officially includes in its statement of the purpose of the act the following:

> *To amend such portions thereof as have been found, either as a result of experience in administering the law, or judicial decisions, to be inadequate to accomplish the purposes plainly intended thereby, and to add thereto such further provisions as seem to be demanded by the consensus of enlightened public opinion,* besides such as are rendered necessary by the recent territorial acquisitions to the United States beyond its continental boundaries. (H. R. Report 982, Fifty-seventh Congress, first session.)

Similarly, Mr. Shattuc said in the House:

> With almost unanimous voice the labor interests of the country have asked from Congress, *legislation for further and more effective restriction of immigration.* Nor is the demand

> confined to this one division of the people; it is sustained by the press, urged by economists and publicists, and indorsed by the platforms of the political parties. Opinions differ as to efficient methods to be applied, some asking measures more drastic than others, *but all insist upon the need of immediate action which shall at least perfect the present laws and regulations, and make them more effective for the purposes intended.* (Fifty-seventh Congress, first session, p. 5763.)

In his statement before the Senate committee, Mr. Shattuc further said:

> The work of the officers having charge of the enforcement of the law was hampered not only by the restrictions of court decisions on laws already existing, *but also by the absence of provisions of law needed to meet changed conditions and evasions which experience had taught aliens and other importers how to easily make.* (Senate Rep. 2119, p. 137, Fifty-seventh Congress, first session.)

The question whether the word "immigrant" should be retained or eliminated was most carefully considered at various times during the progress of the bill. In the House, Mr. Hepburn, referring to those who come to this country every spring from Mediterranean ports to work in the summer and return in the fall, said (Fifty-seventh Congress, first session, p. 5816):

> I think these people ought to be kept out. If you try to do it by the use of the word "immigrant," they say they are not immigrants,

they are tourists, they are visitors. It is not their intention to reside here, and hence the steamship company will not pay this fee. I want something done that will be restrictive of this immense immigration.

Before the Senate committee Mr. Anderson, who represented certain steamship companies, protested as follows:

Mr. ANDERSON. * * * I want to answer another point now, because I do not want to get up again. It is in regard to the manifesting of cabin passengers. The manifesting of cabin passengers and the rules under which the Treasury Department is advised that they may mitigate that requirement, as far as first-cabin passengers are concerned, so that they shall not have to answer all these questions, are made by the Attorney-General on the fact that the word "*immigrant*" is used, and that there is a distinction between cabin passengers and immigrant passengers, who usually occupy the third class.

Now, in this new bill, the word "immigrant" has been eliminated, and it says all cabin passengers must answer, not one question, not other questions, not a sufficient number of questions to satisfy you that they are not objectionable aliens, but every question that is asked a steerage passenger. I do not mean to say that you should not include passengers within these examinations. Do just as you in your wisdom think proper; but it seems to me that you should eliminate a lot of these questions from those that are asked cabin passen-

gers and still get at the real status of these people.

Representative SHATTUC. Mr. Anderson, you suggest we have not used the word "immigrant" in the bill. Do you know the definition of an immigrant?

Mr. ANDERSON. *I only know that the Attorney-General in his opinion has given it a different definition from the word "alien."*

Representative SHATTUC. What would you give as a definition of the word "immigrant?"

Mr. ANDERSON. An immigrant is, in my opinion, one who comes here to settle; and I do not say it is not perfectly proper, as a general thing, to eliminate "immigrant" from the law. I am not telling you what you shall do or what you shall not do, but I am trying to point out to you some evils that are likely to occur, so that in your wisdom you may provide for them.

Representative SHATTUC. *Let me point out one evil that would occur if we should adopt your suggestion and say "immigrant." "Immigrant" means, according to the law books, and dictionaries, and everything else, a person coming into the country to settle permanently; so if we use that word, "all aliens" would apply to nobody except those coming to settle here permanently.* (Senate Rep. 2119, Fifty-seventh Congress, first session, p. 135.)

Before the same committee, Mr. Campbell, special immigrant inspector, stated:

Mr. CAMPBELL. There are many defects in the existing law that result in the defeat of its

obvious purposes. That point was raised here a while ago, I think probably by Mr. Anderson, with respect to the term "*alien immigrant.*" * * * I may say that the Department has for years urged that the manifesting be done in the case of cabin passengers as well as second and third class passengers. We find that some of the most notorious criminals have endeavored to get in as first and second class passengers. I do not know whether you gentlemen remember the case of the two Phœnix Park murderers or accessories to the murder of Lord Frederick Cavendish. They had served their sentence and they came into the port of New York as first-cabin passengers. That was so flagrant a case that they were stopped there and examined. They made that very point; but inasmuch as the Department had the final decision in that case, as to what an "alien immigrant" was under the law, they were deported, the strong probability being that under the decision of the courts, had the matter gone before the courts, they would have been admitted, although they were both convicts.

Senator LODGE. Do you think the arrangements in this bill in regard to the preparation of and swearing to manifests are secure?

Mr. CAMPBELL. Yes. I think so.

(Senate Rep. 2119, p. 152, Fifty-seventh Congress, first session.)

Similarly, before the same committee, Commissioner Williams stated that under the former acts it had been found that sick members of a family came in second class and well members steerage, and that

diseased immigrants who started steerage arrived second class. Thereupon the following occurred:

> Senator LODGE. * * * This bill endeavored to do something towards excluding anarchists from this country.
>
> Mr. WILLIAMS. Yes.
>
> Senator LODGE. Now, if we should undertake to allow cabin passengers, first and second, to come in without examination, wouldn't that absolutely nullify any attempt of that kind?
>
> Mr. WILLIAMS. It certainly would as to them, and it would as to the "favus" people, too.
>
> (Senate Rep., 2119, p. 130, Fifty-seventh Congress, first session.)

Senator Foraker objected that the words "any passenger" would include any alien. He proceeded to say:

> I think there ought to be some such language as "*all immigrant passengers*" if that is broad enough to cover what we have in mind. (Cong. Rec., vol. 36, p. 94, Fifty-seventh Congress, second session.)

In the Senate debate in Committee of the Whole the following occurred:

> Mr. PLATT, of Connecticut. Mr. President, before the bill is reported to the Senate, I should like to understand, if I may, what the effect of this bill is as to the exclusion of aliens. It has been very much amended; so much so that I am in doubt as to what its effect will be. If I understand the bill, *it now purposes*

to exclude from the United States only alien immigrants, and that all other persons who are not immigrants can come into the United States freely without the payment of the head tax. *I do not think that will exclude a great many* from the United States if the language is construed according to its meaning. It was stated yesterday in debate, I see, that an immigrant is a person who comes from a foreign country with the intention to settle in this country.

Mr. LODGE. Not to settle.

Mr. GALLINGER. To remain, however, that would mean to settle.

Mr. PLATT. I certainly think I am not mistaken in my recollection of the definition as quoted from the Century Dictionary by the Senator from Ohio (Mr. Foraker). I will find it in a minute. However that may be whether it means to settle in the United States or to remain in the United States, *it will not reach the great class of undesirable migration to this country.* The Senator from Ohio (Mr. Foraker) said: "The Century Dictionary gives as one of the definitions of the word 'immigrant,' a foreigner who enters the country to settle there." I thought I was not mistaken in my recollection.

Mr. LODGE. Will the Senator allow me to ask him a question?

Mr. PLATT. Certainly.

Mr. LODGE. I suppose the class of undesirable immigrants to whom the Senator refers are those known as birds of passage, who come here for a short time and return, taking their

money with them. But the word "*immigrant*" is the word now used in all our laws on the subject; it is perfectly justified, and the classes it covers are perfectly well known; and I think its meaning has been established by decisions. I think the Senator will find that it will cover all undesirable classes, if I guess right, the classes he has in mind.

Mr. PLATT. That is what I wanted it for. I am not familiar with the decisions. I simply know that yesterday it was stated in the Senate that the Century Dictionary definition of *immigrant is a person who comes here to settle. It does not seem to me that it is worth while to leave the matter so indefinite as it will be left by this bill. I apprehend that after this bill is passed there will be very few alien persons coming to this country who will admit that they have come here to settle or remain.* They will all claim that they have been informed that there is plenty of work to be had in this country at good wages and that what they have come here for is to work until they get a little money, and then take themselves home and better their condition at home. Now, how in the particular enforcement of this bill, is that question to be made? Take the Italians; they do not come here intending to remain and settle in this country. They come, as do the Chinese, to work a while, get American wages, and then go back to their country and buy a little farm or a business there and so better their condition at home. *The question will immediately arise whether they are immigrants in the true meaning of that word* (p. 135). * * *

Mr. PLATT. I made my inquiry from the standpoint of desiring to restrict immigration. I think there is altogether too much of it now in this country, and I wanted to be sure in passing this law there had been restrictions put upon immigration rather than that the possibility of immigration had been enlarged. I hope it will be found when the law shall come to be put into practical operation that such has been the effect of this law, but I doubt it very much. (Fifty-seventh Congress, second session, vol. 36, pp. 135, 136.)

These differences in the Senate in Committee of the Whole resulted as follows:

Mr. LODGE. After the word "every" in line 4 of section 1, I move to strike out the word "passenger" and insert "alien immigrant."

The amendment was agreed to. (Fifty-seventh Congress, second sess., vol. 36, p. 105.)

* * * * *

Mr. LODGE. On page 3, line 4, I move to strike out the letter "s" in the word "aliens" and to insert after the word "alien" the word "immigrant," so as to read "alien immigrant." (Ib., p. 128.)

* * * * *

Mr. FAIRBANKS. On page 6, section 3, line 5, after the word "all" I propose to strike out the letter "s" in the word "aliens" and to insert the word "immigrant."

The amendment was agreed to. (Ib., p. 132.)

* * * * *

Mr. FAIRBANKS. In section 3, page 6, line 12, after the word "alien," I move to insert the word "immigrant."

The amendment was agreed to.

Mr. FAIRBANKS. In section 3, page 6, line 13, after the word "alien," I move to insert the word "immigrant."

The amendment was agreed to.

Mr. FAIRBANKS. At the end of line 19 on the same page, after the word "alien," I move to insert the word "immigrant."

The amendment was agreed to.

Mr. FAIRBANKS. In section 3, page 7, line 1, after the word "alien," I move to insert the word "immigrant."

The amendment was agreed to. (Ib., p. 133.)

The Senate amendments inserting the word "immigrant" and eliminating the educational test, being nonconcurred in by the House, the bill went to conference, and was reported therefrom in its present form and so passed.

It is only necessary to submit these extracts from the proceedings in Congress to establish beyond a possibility of contradiction that in striking out the word "immigrant" Congress had a definite purpose in mind. More than that, the reply of Representative Shattuc to Mr. Anderson's objection to the omission of the word "immigrant," in which he calls attention to its definition, seems to indicate that it was intended that the words "all aliens" should be used in their literal and comprehensive sense.

B. A study of the various sections of the statute shows that Congress intended to include something more than passengers in using the words "alien" or "any alien."

Section 1 provides that there shall be levied, collected, and paid a duty of $2 *for each and every passenger* not a citizen of the United States, etc. In the predecessor act of 1893 the head tax was levied on "alien immigrants." As will be pointed out hereafter, in the later sections of the act the word "alien" is generally used as descriptive of the class of persons with whom the statute deals. It can hardly be argued that the word "alien," as used in section 18 of the act, is synonymous with "alien passenger," since where Congress intended that the act should apply to passengers alone it specifically and in terms referred to passengers. The term "alien" is certainly a broader one than "each and every passenger not a citizen of the United States." The only classes of persons on board a ship are the passengers and the crew. The conclusion is irresistible that it was the intention of Congress that section 18 should apply to every alien, whether a passenger or a member of the crew.

Section 2 of the act provides that certain "*classes of aliens* shall be excluded from admission into the United States." Taking into consideration the phraseology of the first section, it would seem that this section applied not only to alien passengers but to alien seamen as well. It is true that in the case

of *Rodgers* v. *The United States* (152 Fed., 346), the Circuit Court of Appeals for the Third Circuit held that the act of 1903 did not exclude an alien who had already claimed a residence in this country, even though such alien was within one of the classes excluded by the second section of the act.

While the Government believes that this decision was due to the fact that the attention of the court was not called carefully to the changes in the law made by the act of 1903, it by no means follows that the Rodgers case is determinative of the case at bar. It may be that the alien Buchsbaum, whose admission to the country was in issue in that case, had, by a *bona fide* residence of four years in the country and by filing his declaration to become a citizen, acquired an inchoate status which excepted him from the general provisions of the act. Certainly there is no similarity between his case and the case of an alien who comes to the country for the first time.

The plain purpose of the second section of the act is to exclude certain classes of aliens, and it is undeniably true that an alien seaman who is an anarchist, a polygamist, or a person likely to become a public charge (as was the case with Ramadonawich) is as undesirable an addition to the population of the country as an alien passenger laboring under a similar disability.

The term "alien" next appears in section 4, which refers to contract laborers and forbids the assisting or

encouraging the importation "of any alien into the United States in pursuance of any offer, solicitation, promise, or agreement * * * made previous to the importation of such alien, to perform labor or service of any kind, skilled or unskilled, in the United States." It seems clear that the labor or service referred to in section 4 does not include the labor incidental to the docking, loading, or unloading of a ship, which is logically a part of the work of the voyage. When we come to labor done entirely apart from the ship an alien seaman is as much within the prohibition of the statute as any other alien.

This view of the meaning of the word "laborer" is sustained in the following cases: *In re Moncan* (14 Fed., 44, 47); *In re Ah Kee* (22 Fed., 519, 520).

In the *Moncan case,* Judge Deady used the following language:

> Upon this view of the case the Patrician has simply touched at this port. Her stay here is only temporary and for an object necessary to enable her to prosecute a voyage to a foreign port with profit to her owners. *Nor do I think that the Chinese members of the crew of the Patrician are laborers within the meaning of this act. True, their vocation is labor, but they are not brought here to remain and enter into competition with the labor of the inhabitants of the country.*

In the *Ah Kee case,* Judge Brown said:

> The title of the act is "An act to execute certain treaty stipulations relating to Chinese." By article 1 of the treaty of 1880 (22 Stat.,

826), it is provided that "the limitation of suspension shall be reasonable and shall apply only to Chinese who may come to the United States as laborers, other classes not being included in the limitations." Persons prohibited by the act from coming within the United States are throughout described by the phrase "Chinese laborers." The well-known use and meaning of this phrase and contemporaneous history leave no doubt in my mind that the words "Chinese laborers" have no reference to seamen in the ordinary pursuit of their vocation on the high seas, who may touch upon our shores and may land temporarily for the purpose only of obtaining a chance to ship for some other foreign voyage as soon as possible and who do not intend to make any stay here *or enter upon any of the occupations on land within this country. Such persons do not come "to the United States as laborers," that is, as laborers within the United States in the sense of the act, and hence "are not included in the limitations.*"

The same thing is true of sections 5 and 6.

Sections 9, 10, and 11 relate to the exclusion of diseased aliens. It is hardly necessary to argue that it is as important to exclude an alien seaman afflicted with a loathsome or dangerous contagious disease as to exclude any other person similarly afflicted. The very spirit and purpose of the act require that alien seamen should be regarded as included within the prohibition of these sections.

Section 12 obviously and in terms applies only to aliens who are going to land, since among the state-

ments that must be made on the manifest is the "seaport for landing in the United States." If an alien is a member of the crew who is not going to land within the meaning of the statute the section plainly has no application.

The same is true of the four sections immediately following.

This brings us to a consideration of section 18, the interpretation of which is in issue in the case at bar. The plain purpose of this section is to bring about the exclusion of aliens who are likely to spread disease, to become public charges, to injure the moral or political well-being of a community into which they might come, or to enter into competition with labor which would lower the standard of living of the American workingman.

As has already been pointed out, the language of the section makes it plain that it was the intention of Congress to provide that those in control of any vessel coming into a port of this country should take due precautions to prevent any alien from landing at any time and place other than that designated by the immigration officials, and that the term "any alien," as here used, is broader than the term "each and every passenger," as used in section 1.

In *Heydon's case* (2 Coke's Reports, Fraser's edition, vol. 2, p. 19), the following rule is laid down:

> And it was resolved by them that for the sure and true interpretation of all statutes in general (be they penal or beneficial, re-

> strictive, or enlarging of the common law), four things are to be discerned and considered:
>
> First. What was the common law before the making of the act.
>
> Second. What was the mischief and defect for which the common law did not provide.
>
> Third. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth.
>
> And fourth. *The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the act, pro bono publico.*

This rule of construction is as sound to-day as when it was laid down three hundred years ago, and applies as well to statute law as to common law.

Studying the immigration law in the light of this rule, it is undeniably true that the construction which will "suppress the mischief" and "advance the remedy" is the construction the Government puts upon the act. The petitioner's interpretation is "pro privato commodo;" that of the Government "pro bono publico."

In *Leversee* v. *Reynolds* (13 Iowa, 310) it was said by the court:

> To hold that the jurisdiction is limited to the township of defendant's residence, or where the property may be found, would

> involve the necessity of rejecting, as unmeaning and surplusage, a portion of the language of the statute. For certainly, as thus construed, the words "and justices shall have jurisdiction therein (that is in such cases) within the county" would be entirely without meaning. *This is never allowed, if a construction can be legitimately found which will give force to and preserve the words of the statute.*

In the case of *Torreyson* v. *Board of Examiners of State of Nevada* (7 Nev., 19, 22) the following rule is laid down:

> Again, no part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can properly be avoided.

The fact that the act retains the title of the former acts and is called "An act to regulate the immigration of aliens into the United States" is not inconsistent with the application of the text to all aliens and even if it were, it could not override the plain purpose of the text to refer to all such aliens.

There is not necessarily any conflict whatever between the construction of the act itself hereinbefore asserted and the title which the act bears, for Congress may perfectly well have considered, and as the legislative history shows, actually did consider (*e. g.*, Senator Platt's statement, *supra*), that the attainment of the ultimate object preventing settlement in this country of undesirable immigrants could not surely be obtained without exclusion altogether of every alien falling within the prohibited classes. Obviously, there is no way by which the Government could

protect itself against the permanent settlement in the country of prohibited aliens who affect entrance in the guise not of immigrants, but of mere transitory visitors. Obviously the Government can not keep track of all such immigrants and make sure that they do not extend their temporary visit into a permanent settlement in violation of the purpose of the act, even as so construed.

But even if the title of the act be deemed inconsistent with our construction, the title must yield to the plain and unambiguous language of the text.

U. S. v. *Palmer* (3 Wheat, 610, 631).
U. S. v. *Fisher* (2 Cranch, 358, 386).
U. S. v. *McCrory* (119 F. R., 861).
Hadden v. *Collector* (5 Wall., 107).
The New York (108 F. R., 102, 109).
U. S. v. *Briggs* (9 How., 351).
U. S. v. *McArdle* (2 Sawy, 367).

FOURTH POINT.

But even if the section should be interpreted to relate only to immigrants, and not to aliens generally, it is still applicable to the case at bar. An immigrant is defined in the Standard Dictionary as "a foreigner who enters a country to settle there," and in the Century Dictionary, "a person who migrates into a country for the purpose of permanent residence." From these definitions it appears that two elements are necessary to constitute one an immigrant—first, physical presence in the foreign country, and second, the intention to settle in that country. It is immaterial, then, how the original entrance was effected,

or at what precise moment the determination to remain was made. In the case at bar Ramadonawich remained in the country for six weeks after leaving the ship, and that he may be assumed to have intended to stay in the country appears from the following portions of his testimony:

> Q. When did you decide not to go back to the *Slavonia?*
>
> A. On the same day.
>
> Q. When you left the ship that evening did you intend to go back to the ship?
>
> A. When I left the ship I thought so, but not later. (Record, p. 11.)

FIFTH POINT.

The ruling asked for by the petitioner defeats the very purpose of the act.

During the fiscal year ending June 30, 1907, the records of the Department of Commerce and Labor (Bureau of Statistics) show that there entered and cleared in the various ports of the United States 9,039 sailing vessels and 25,584 steam vessels engaged in the foreign trade. There are unfortunately no figures available which show accurately the number of seamen entering the ports of the United States during the same period, but when it is realized that a large trans-Atlantic liner carries a crew of several hundred persons, the number must amount to many tens (and possibly hundreds) of thousands of persons.

If it is to be held that section 18 of the act of 1903 does not apply to alien seamen, it is easy to see that this loophole alone would be equal to a wholesale

annulment of the immigration laws in so far as they relate to adult male aliens. Take for example the case at bar. Ramadonowich clearly belongs to one of the excluded classes. Substantially no precautions were taken to prevent his escape and no attempt was made to bring him back to the ship. The immigration authorities were not even notified that he was at large in the country. On the same trip twenty-two other alien seamen escaped, and the testimony of Mr. Brown, who has been agent of the Cunard Company at New York for upwards of twenty-five years, and who may therefore be presumed to be thoroughly familiar with the steamship business, is to the effect that there is hardly a trip of the larger ocean-going vessels, at least, on which there are not some desertions. When one considers that nearly 35,000 ships engaged in the foreign trade come into the ports of the United States annually some idea may be formed of the size of the loophole which the petitioner urges that Congress left open for the evasion of the immigration laws. So far as the public interests are concerned it is a matter of no consequence whether a person belonging to one of the excluded classes comes into the country as a passenger or as a seaman.

Counsel for the petitioner in his brief calls attention to the fact that an entire title of the Compiled Statutes is devoted to merchant seamen, and from that argues that Congress could not have intended to pass a law not in harmony with these statutes.

A brief consideration of Title 53, Compiled Statutes, will show that this contention is without merit. Chapter 1 of that title deals with the appointment of shipping commissioners and their clerks, and provides for the shipment and discharge by the commissioner of crews for vessels in the coastwise trade.

Section 4508 reads as follows:

> Duties of Commissioner: The general duties of a shipping commissioner shall be—
>
> First. To afford facilities for engaging seamen by keeping a register of their names and characters.
>
> Second. To superintend their engagement and discharge in manner prescribed by law.
>
> Third. To provide means for securing the presence on board, at the proper times, of men who are so engaged.
>
> Fourth. To facilitate the making of apprenticeships to the sea service.
>
> Fifth. To perform such other duties relating to merchant seamen or merchant ships as are now or may hereafter be required by law.

There is no way, however, in which the shipping commissioner can keep any track of deserters from a foreign ship while in a port of this country. For all information of that character he must rely on the master of the ship himself.

Chapter 2 of the title relates to the apprenticing of boys to the sea service, form of shipping articles and the ruling for the same, and provides for penalties for violation of these sections.

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Chapter 3 deals with great particularity with the wages and effects of seamen, with liens for wages, etc.

Chapter 4 deals with the way in which seamen shall be discharged.

Chapter 5 deals with the disputes between a master or owner and his crew, with the rights of the respective parties, the seaworthiness of vessels, etc.

Chapter 6 relates to fees of shipping commissioners, and

Chapter 7 to offenses by seamen and the punishment therefor. Penalties are provided for desertion and for failure to join a vessel and proceed to sea, or for absence without leave at any time within twenty-four hours of the vessel sailing from any port, but of course these punishments can only be inflicted in cases where the master or some one familiar with the facts makes complaint.

There is nothing in this entire title which in any way protects the United States against the admission of undesirable aliens who may come into a port of the country as articled seamen, and, as has been said before, if the immigration laws fail to accomplish this very evident purpose of Congress the Government is powerless to prevent wholesale evasions of the immigration laws.

SIXTH POINT.

There is no commercial necessity for the construction put upon the act by the petitioner.

Section 18 does not make the captain an insurer of his crews, but simply requires that he shall adopt due precautions to prevent the permanent separation

of a seaman from the ship. As was said by Judge Thomas in a precisely similar case (*U. S.* v. *Schulz*, p. 49, App.):

> *I have read you that it shall be the duties of the officers, etc., to prevent the landing of any alien from such vessel. That certainly does not mean that the crew of the vessel must not be permitted to go ashore. I have no idea of making any such suggestion, but I do mean to say to you that it is the duty of a ship to use some precautions that shall be useful and valuable to prevent any member of the crew going ashore and escaping.*

Judge Thomas's views were further well expressed in the course of his charge in the case at bar, as follows:

> Now, if a captain under this statute should take a man, let him go, and say to him "go off the ship and *sever our relation*, you go ashore," he would then *land* him. If the man said to the captain "I am going ashore," and the captain knew that he was going ashore, or that it was reported to him and he had reason to believe that he was going ashore, and he stood by and said nothing, then he would permit him to land and it would be connivance and concert of action between the alien and the captain that would be so apparent that, of course, the case would not be here. But suppose that he does not know in a particular case that the alien is going to desert the ship and land; that is, to go ashore without that intention, and that he changes his mind afterwards and remains, *still it is the duty of the captain to use due precautions, lest a member of*

> *his crew, an alien, does go ashore and fails to return.* * * * So, if the captain of the ship does not use due precautions to shut off opportunity for this *desertion and landing*, due precaution to prevent the overt act which the alien does, then he would fall under the condemnation of the act.

The captain must then take due precautions to see that any man taking his customary shore leave does not desert the ship permanently. Whether or not these due precautions have been taken is a matter for the jury to determine. (*Davidson Steamship Co.* v. *U. S.*, 205 U. S., 187.) In the case at bar this question was left to the jury, under fair and reasonable instructions, and the jury found that the captain had been negligent.

If he had taken all the precautions that a reasonable man familiar with the manners and customs of seamen could have taken he would have been guilty of no offense. The record of the case, however, shows that substantially no precautions at all were taken, and an unknown cook, who had been on the ship but one trip across the ocean, was allowed to wander off in the city of New York without any check whatever being kept on his movements and without any effort being made to bring about his return to the ship when it was found that he had deserted. Not only did the captain himself make no effort to recover any of the deserters, but he did not even inform the immigration authorities that these twenty-three aliens, who had been subjected to no

examination to determine whether they had a right to land, were in the country.

The necessities of commercial intercourse do not require that the master of a ship should disregard the laws of the country into one of whose ports he goes in so careless a manner.

The petitioner in his brief, page 72, urges that there is an inconsistency between the immigration act of 1903, as construed by the Government, and the treaty between the United States and Great Britain relating to the recovery of persons who may desert from merchant vessels from either country while in the ports of the other country, negotiated June 3, 1892. Article 1 of the treaty provides that consuls-general, consuls, vice-consuls, and consular agents of either of the high contracting parties residing in the dominions, possessions, or colonies of the other shall have power to require from the proper authorities the assistance provided by law for the apprehension, recovery, and restoration of seamen who may desert from any ship belonging to a citizen or subject of their respective countries while in the ports of the other country.

This language involves no conflict between the treaty and the immigration act. The consular officers of Great Britain could, in this case, have called upon the proper authorities for the return of Ramadonowich, and it can not be doubted that the necessary assistance would have been given, and that the alien would have been returned to the *Slavonia* to be dealt with according to law.

This treaty can not, therefore, be treated as an excuse for the neg igence of the captain in allowing a member of his crew to escape.

SEVENTH POINT.

The interpretation of landing as meaning a permanent separation from the ship is justified, both on principle and on authority.

The petitioner argues that the word "landing" must be construed to include every stepping off the ship, no matter how temporary or how closely related to the business of the ship, and that on that account the commercial necessities compel the construction of the words "any alien" as not applying to the members of a ship's company.

It seems obvious on principle that the word "landing," as used in the statute, refers to a permanent separation from the ship. It can hardly be argued that in the absence of all regulations a passenger who was allowed to step off onto the dock and to remain there for a brief period of time under the surveillance of an officer would not have been landed within the meaning of the statute, and section 18 merely requires that those responsible for the ship's company shall not allow them to separate themselves permanently from the ship until the formalities prescribed by the immigration laws have been complied with.

This construction of the word "landing" not only seems correct on principle, but is further supported by well-considered decisions: *In re Moncan* (14 F. R., 44); *in re Ah Kee* (22 F. R., 519); *in re Jam*

(101 F. R., 989). In these cases it was directly held that the prohibition of landing and coming to the United States did not constitute a prohibition of every stepping ashore of seamen, but only of such acts as really constitute a severance from the ship. Each of these cases arose on habeas corpus issuing on behalf of Chinese *seamen* charged with being in the country in violation of the Chinese-exclusion law, and in each case the court ordered the release of the seaman in question on the explicit ground that he was not undertaking to remain in the country detached from his ship. The courts recognized precisely the distinction advanced by the respondent in this case; namely, that whereas a seaman does not land within the meaning of the statute by stepping ashore for purposes of the ship or by way merely of shore leave, his act is nevertheless a landing within the statute if he does remain in the country for any other purpose and sinks into the domestic population.

In the Moncan case, decided in the Circuit Court of the District of Oregon, Judge Deady said:

> Of course a Chinese seaman, although allowed to come into the ports of the United States as one of the crew of a vessel from a foreign port, *does not thereby obtain the right to remain in the country* and become a laborer therein, and *if the master allows him to go ashore permanently*, the latter will be liable to removal and the former to the punishment prescribed in section 2 of the act, but such seaman would have the same right to be on shore

> temporarily and not otherwise employed than in the business of the vessel during her stay in port as those of other nationalities. My conclusion is that neither Moncan nor Ah Kee are within the purview of the act of May 6, 1882, because * * * (2) they are here only as members of the crew of a vessel arriving from a foreign port and taking on cargo for another. (14 Fed., 48, 49.)

Section 2 of the act of May 6, 1882, referred to above, reads as follows:

> That the master of any vessel who shall knowingly bring within the United States on such vessel and land or attempt to land or permit to be landed any Chinese laborer from any foreign port or place shall be deemed guilty of a misdemeanor.

In the Ah Kee case, supra, Brown, District Judge, sitting in the Southern District of New York, said (p. 521):

> Should a Chinese person, coming here and landing as a seaman, remain for any other purpose or engage in the labor of the country, he would plainly become amenable to the provisions of the act.

And the seaman before him being not within this class was discharged upon the condition, however, that he file a bond in the sum of $500 to reship within thirty days, as was his proved intention.

In the Jam case, supra, Judge Brown said:

> The petitioner, being a seaman, is not within the purview of the act so long as he

> merely touches here for no other purpose than to reship so soon as shipment can be obtained, and he is, therefore, discharged. *But to guard against abuses* such persons should be required to give bond with surety in the sum of $500 to the collector to ship within thirty days.

In the case at bar Ramadonawich was remaining in this country as part of its ordinary population and not as a seaman. He had thus "landed" in the legal sense, as defined in the above cases, and had not merely gone ashore on the business of the ship or in the course of his ordinary shore leave.

The landing having so occurred and the captain having failed to take due precautions to prevent it, he was properly convicted, as it must be presumed the captain referred to by Judge Deady would have been convicted under similar circumstances.

EIGHTH POINT.

The contention of the petitioner that his conviction was the result of what was substantially an interpretation which made the law ex post facto in its application, on the ground that it made an act criminal which was not criminal when performed, is unwarranted.

This interpretation overlooks the fact that the act denounced by section 18 is not the going ashore of the alien or his remaining in the country, *but the failure of the captain to take due precautions.* The essence of the offense, then, is the negligence of the owner, officer, or agent of the ship.

In the case at bar the jury found and the record shows that the captain failed, first, to take proper precautions to prevent a member of his crew from going ashore, in spite of his lack of knowledge of the man and the man's own irresponsible character (the record shows, page 8, that Ramadonawich was a mere boy of 20, who had shipped as cook for £2 a month); and, second, having given shore leave, to grant it under such conditions and restraints as would tend, as far as possible, to forestall influences which might cause a change of mind; and, third, to take proper precautions to prevent persons who have so gone ashore and so changed their minds from perfecting their escape and completing their separation from the ship in violation of the immigration law.

Obviously no question of an ex post facto nature is involved in the case.

NINTH POINT.

The interpretation put upon the act by the Bureau of Immigration accords with the Government's contention.

At the trial of the case in the Circuit Court the petitioner in this court attempted to put in evidence an extract from a recent report of the Commissioner-General of Immigration which, it was alleged, tended to show that his Bureau construed section 18 as not applying to alien seamen. The court ruled this evidence out on the ground that the act itself was clear and unambiguous and admitted of no construction. This ruling was clearly correct.

Both the phraseology and the legislative history of the statute, which have been referred to heretofore, show that there is no ambiguity in the act and no doubt as to the intention of Congress.

However, reference to Department Circular No. 10 of the Bureau of Immigration, under date of August 1, 1903, shows very clearly that the recommendation of the Commissioner-General, quoted on page 78 of the petitioner's brief, was made only in order that any possible doubt might be obviated and the law made so plain that no one could even attempt to dispute its meaning.

Section 2 of this circular reads as follows:

> Alien seamen who are discharged or are to be discharged or who have deserted from a vessel at a port of the United States with any other object in view than departing, as prescribed in the next preceding paragraph, *are in no respect to be distinguished from other aliens seeking admission to this country*, either as regards the question of head tax on their account or as respects the examination and determination of their right to remain under the various acts regulating immigration.

The departure described in the paragraph referred to requires alien seamen who seek to land in the regular course of their pursuit to have the intention of departing as soon as practicable upon some outward-bound vessel.

It is not pretended in the case at bar that Ramadonawich had any such intention, and it is, therefore,

entirely clear that in his case, at all events, the ruling of the Department would have been that he was subject to all of the provisions of the immigration acts.

Had the Bureau of Immigration put the construction on section 18, that is claimed by the petitioner, this case would not be here. When it is realized that not only is this particular case before the court, but that similar cases have been presented to the various United States attorneys by the immigration authorities in the Southern and Eastern Districts of New York, in the District of New Jersey, in the District of Eastern Pennsylvania, in the District of Eastern Louisiana, in the District of Northern California, in the District of Oregon, and in the Western District of Washington, and that as a result legal proceedings have been instituted in all those districts, the claim that the Department of Commerce and Labor construed section 18 as not applying to alien seamen, becomes utterly untenable. At every port in the country where any considerable number of aliens enter, with the single exception of Boston, prosecutions under section 18 have been instituted by the Department of Justice at the request of the Department of Commerce and Labor. A mere statement of the facts shows the absurdity of the contention, that immigration authorities have construed the act as the petitioner claims.

SUMMARY.

I. The respondent therefore respectfully urges that the language of the statute is clear and unam-

biguous in expressing the intention of Congress and should be given effect;

II. That the legislative history of the act shows that it was intended to include seamen in its provisions;

III. That the very spirit and purpose of the act require that alien seamen should be regarded as coming within its provisions.

As there was no error in the trial of the case the judgments of the Circuit Court and of the Circuit Court of Appeals should be affirmed.

ALFORD W. COOLEY,
Assistant Attorney-General.

OCTOBER, 1907.

APPENDIX.

United States Circuit Court, Eastern District of New York.

Before Hon. EDWARD B. THOMAS, United States judge, and a jury.

UNITED STATES *v.* CARL SCHULZ.

Wm. J. Youngs, United States attorney, for the Government.

Clarence Bishop Smith, for the defendant.

Borough of Brooklyn, April 23, 1904.

The court charged the jury as follows:

GENTLEMEN OF THE JURY: I call your attention very briefly to the law. The defendant was indicted under two sections of the statutes. Section 8 provides that any person, including the master, agent, owner, or consignee of any vessel, who shall bring into or land in the United States any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter the United States, shall be guilty of a misdemeanor. So that one charge that is brought against the defendant Schulz is that he did bring into the United States and land the man who is Zacharias Gabalias.

The next charge against him is found under section 18 of the statute. That section makes it an offense if any one officer or person in charge of the vessel shall land or permit to land any alien at any time or place other than that designated by the immigration officers. The defendant is charged with having

landed Gabalias at Brooklyn, a place other than that designated by the immigration officers.

So that you see these charges run together. They are really for bringing into the country and landing a person not entitled to be landed, and for landing and permitting such person to land at a place other than that designated by the proper officer.

In the first place, the question is whether the defendant landed Gabalias or whether he permitted him to land. Now, where the charge is that a defendant has landed an alien, it is not necessary that he should be immediately in control of him, that he should supervise the landing; but if in any way he was privy to it, acknowledged that it was going to be done, or ordered it to be done, or directed that it be permitted to be done, he would be just as guilty as if he had taken the alien by the collar and led him off the ship or otherwise assisted him.

So the first question is whether the defendant here actually and intentionally and knowingly landed Gabalias, or participated in it in any way by any direction to his officers, or knowingly allowed his officers to do it. If he did, why, he is guilty of landing him. If he did not, he is not guilty of landing him.

Now, although he is not guilty of landing him, suppose that he permitted him to be landed. And I take it that under this statute that permission might arise from some direct permission—saying so in so many words—or by having knowledge that it was going to be done and not restraining it, or it might be done by an absolute disregard of all care on the subject. In other words, a man might be guilty of such gross negligence that you could infer permission to land from the absolute lack of care that was taken to prevent landing. Of course you

are not trying the defendant for negligence, unless it is negligence so gross that you must infer from it an intention to allow the man to go ashore without the expectation of his returning.

Now, I have called attention perhaps a little too emphatically to the first words of this second section. I have read you that it shall be the duty of the officers, etc., to prevent the landing of any alien from such vessel. That certainly does not mean that the crew of the vessel must not be permitted to go ashore. I have no idea of making any such suggestion. But I do mean to say to you that it is the duty of a ship to use some precautions that shall be useful and valuable to prevent any member of the crew going ashore and escaping; and if a person is not a member of the crew, all the more precaution should be taken to see that he be not allowed to land. Of course, dealing with a member of the crew, the matter is much more difficult than it would be in dealing with a person who is not a member of the crew. It would be an intolerable hardship if the members of the crews of ships coming to port could not go ashore. And if I were a member of the jury, I should think that very much less precaution should be taken with a *bona-fide* member of the crew and one who the officers had no idea would desert than with a man who was not a member of the crew, but who was working his way on the vessel for the purpose of coming to the United States.

Now, here is the law, and these are the views I have to express on it. It is for you to say whether the defendant had anything to do with the landing; and that carries with it the idea of intention—that is, the intention of letting him go from the ship, or

that he permitted it in such a way that you have a right to infer that he intentionally did wrong or did not care whether or not he did wrong.

Of course, you will remember in this case, as in every other, the defendant is presumed to be innocent until he is proven guilty; and therefore you must be convinced beyond a reasonable doubt that he is guilty before you can convict him. A reasonable doubt is a doubt that appeals to men of good judgment, to a man of brains and common sense, who is not afraid to do his duty and not over-rash in the performance of it.

REQUESTS TO CHARGE.

Mr. YOUNG. I ask your honor to charge that if the jury find that this man's, Zacharias Gablias, name did not appear on the ship's list, he was not a member of the crew, *bona fide* or otherwise.

The COURT. I leave the whole question as to whether he was a member of the crew to be determined by the jury. And, of course, they will consider the absence of the name from the ship list, if it is absent from the passenger list, if it is absent from the manifest—of course, you will consider all the evidence—the relation of Gabalias to this crew, and if he were simply working his way over, I think he stands in a different light from a member of the crew.

Mr. SMITH. I ask your honor to charge that Gabalias said that he signed this paper in the counsel's office.

The COURT. This paper?

Mr. SMITH. A paper in the counsel's office when he shipped.

The COURT. The jury heard it.

(The defendant was acquitted.)

United States District Court, District of New Jersey.

THE UNITED STATES, PLAINTIFF, *v.* ADABERT KRECH, DEFENDANT.

(An indictment under sections 8 and 18 of the alien act of March 3, 1903.)

TRENTON, *February 23–24, 1905.*

Transcript of the ruling on the motion to direct a verdict, and the charge of his honor, William M. Lanning, judge of the United States District Court, in the above case.

PRESENT: Mr. John B. Vreeland for the Government. Messrs. Clarence B. Smith and Everett P. Wheeler appeared for defendant.

At the close of the Government's case, Mr. Smith on the part of the defense moved that a verdict be directed for the defendant on the following grounds:

1. That it clearly appears from the evidence that Paul Rockstroth was *bona fide* one of the crew of the *Graf Waldersee*, who had been on her for several voyages, and that the statute of March 3, 1903, mentioned in the indictment, was intended to apply, and does apply to immigrant aliens and not to members of the crew of vessels coming to this country.

2. That there is no proof that when Rockstroh left the ship he intended to make his permanent residence in this country, but that on the contrary there is uncontradicted proof that when he landed he intended to continue his profession as a ship steward, in which he had been employed more than seven years in the Hamburg Line and before that on other steamship lines. It was only when he received an offer of permanent employment that he determined to remain here, and two months later

sent for his wife and children. On no reasonable construction can the statute apply to seamen who land here with the intention of taking ship again and continuing to act as part of the crew of vessels. It is clear that if Rockstroh had continued his original intention and had shipped on another vessel no crime would have been committed.

Defendant can not be convicted of a crime which consisted in a change of mind on the part of Rockstroh after he had landed.

3. Preliminary papers of naturalization had been issued to Rockstroh by a court of competent jurisdiction, and he can not therefore be considered an alien not lawfully entitled to enter the United States, in the sense in which that word is used in the statute under which the defendant has been indicted.

(The motion was then argued.)

The COURT. I have concluded that the motion to direct a verdict for the defendant in this case must be denied. There are material modifications of the previously existing legislation on the subject of immigrants made by the act of March 3, 1903. The two cases to which my attention has been directed, that of the *United States* v. *Burke*, in 99 Federal Reporter, and that of *Moffit* v. *United States*, in No. 128 Federal Reporter, deal with section 6 and section 10 of the act of 1891. Section 8 of the act of 1903 is the section that deals with the subject-matter embraced in section 6 of the act of 1891. The two cases that I have been referred to dealt with the immigration laws as given in the legislation preceding the act of 1903, and relate only to those aliens who came to this country with the intent of

making this country their place of permanent residence, and that was the theory upon which those cases were decided. The act of 1903 is considerably broader. I am not prepared to say that in construing the act of 1903 it should be given the narrow meaning which was given to the preceding legislation by the cases to which reference has been made.

For example, in the act of 1891 it was stated that any person who should bring into or land in the United States, by vessel or otherwise, any alien "not lawfully entitled to enter the United States," should be guilty of a misdemeanor. But in section 8 of the statute of 1903, it is provided that any person, including the master, agent, or owner or consignee of any vessel who shall bring into or land in the United States by vessel or otherwise, any alien "not duly admitted by an immigration inspector, or not lawfully entitled to enter the United States," shall be guilty of a misdemeanor.

It will be observed that Congress inserted into this section an entirely new provision, namely, that any person who should bring into or land in the United States any alien "not duly admitted by an immigrant inspector" should be guilty of a misdemeanor. That clause is not contained at all in section 6 of the act of 1891. The word "immigrate," it is true, is defined in some dictionaries as a word meaning to remove from one country to another with intent to make the latter country a place of residence, but the meaning of the word must be ascertained from the context, and it seems to me, as I read the provision of the act of 1903 (very cursorily I have to read them, for the question presented to me is an entirely new one), that the word "immigrant" or "immigrate" or "immi-

gration " has a broader meaning than it had under any previous legislation and that it may have—indeed it seems to me that it probably does have—its strict etymological meaning. An immigrant, under the act of 1903, may be one who comes from another land into this land, whether he intends to make this land his place of permanent residence or not.

The act seems to provide that a person who has not been duly admitted by an immigrant inspector and who is an alien, shall under no circumstances be permitted to land on the soil of the United States.

As this seems to me, from the hasty consideration of the subject I have been compelled to give it, to be the probable meaning of the act of 1903, I must overrule the motion and an exception will be allowed—no, no exception will be allowed unless you rest now. I overrule the motion.

CHARGE TO THE JURY.

LANNING, J.

GENTLEMEN OF THE JURY: In this case, or rather in these cases, there are two counts in each indictment. The first count charges the defendant in each case with unlawfully bringing into and landing in the United States this man, Rockstroh, who had not been duly admitted by an immigrant inspector and who was not lawfully entitled to enter the United States. That charge the counsel for the Government has said the Government will not press and will not ask for any conviction upon it. Each of these two defendants, therefore, may be acquitted by you on that count. I myself agree

with counsel for the Government as to the wisdom of not insisting upon a conviction under this first count. I do not myself think that the evidence would justify it.

The clerk, therefore, may take your verdict now in each of these two cases as to the first count, which should be a verdict of acquittal.

(The jury then rendered a verdict of not guilty on the first count in each indictment.)

I have had this course adopted, gentlemen, that in the comments I make to you and in the duty that is imposed upon you, there may be a simplification of the questions to be discussed and considered. You have now before you for consideration only the charge that is contained in the second count of each of these two indictments. The law upon which that count was founded has already been read to you. But let me read to you that part of the law of 1891 which deals with the subject-matter that is contained in section 18 of the law of 1903, with a view of showing you the difference between the two laws. Section 8, the latter part of section 8, of the law of 1891 reads thus:

> It shall be the duty of the aforesaid officers and agents of such vessel to adopt due precautions to prevent the landing of any alien immigrant at any place or time other than that designated by the inspection officers, etc.

The law now reads:

> "That it shall be the duty of the owners, officers, and agents of any vessel bringing an alien to the United States" (not only an

> alien immigrant, but in bringing an alien into the United States) "to adopt due precaution to prevent the landing of any such aliens from such vessel at any time or place other than that designated by the immigration officers."

The other portions of the act of 1903 provide that an alien can not be landed in the United States until after the permission of an immigrant officer has been secured. He must be duly admitted by an immigrant officer or an immigrant inspector in order to justify his landing.

Now the real question that you have before you in these cases, as counsel on both sides have said, is, were due precautions taken in this case to prevent the landing of this man Rockstroh. He landed; there is no question about that. He was here in our country for some weeks or some months after July 17, when he landed, before he was arrested, and he is still here, having been detained since his arrest to be used as a witness in this case.

So he landed; he is an alien, there is no dispute about that. He is not here by virtue of the consent of any immigrant officer—that is not disputed. He is unlawfully here; that is not disputed, and I repeat that the principal question is, Were due precautions taken by the officers of this vessel to prevent his landing? Observe, that the language of the act is not that the officers of the vessel shall exercise ordinary precaution but due precaution. Due precaution depends upon the circumstances of the case. The officers of the vessel must exercise due precaution to see that a passenger who has paid his passage, and who is intending to come into this country to reside here, shall not land without the consent of an immigrant officer. Due

precaution must also be taken to prevent the landing in such manner as to remain here in this country of any member of the crew, for my construction of the act of 1903 is that it applies to members of the crew as well as to passengers. But I do not mean to say that what constitutes due precaution as to members of the crew generally will also constitute due precaution as to passengers; nor what constitutes due precaution as to passengers will necessarily constitute due precaution as to members of the crew. As I said a moment ago, due precaution will depend upon the circumstances of the case.

Now, what were the circumstances in this case? What were the facts? They have already been referred to and I shall not discuss them in detail. Let me refer to them briefly. On July 16 this man Rockstroh was charged with a criminal offense on board the vessel for which he can not be tried in this country, but must be tried in Germany if tried at all. He was a member of the crew. An investigation of the charge was made by the captain and the first officer. They were so far satisfied of the truth of the charge that they felt justified in locking him up. They kept him locked up until after the vessel had been docked at Hoboken and until after the passengers had all been discharged and then he was released. The captain had authorized his release, and the first officer was the man who actually did release him. Being a German citizen, being an employee of the Graf Waldersee, having been employed for an indefinite period, as the evidence shows, he should have been taken to Germany, and, as the evidence also shows, he should not have been discharged at Hoboken

even under the German law without the consent of the German consul. Was there any reason why the officers of this vessel should exercise any greater precaution to prevent this man escaping than to prevent any other member of the crew from escaping? That is a fair question for you to consider and answer. Here he was charged with a crime. If he got back to Germany there would probably be a trial. If he got back to Germany there would be a report of the case made to the authorities there. Was there any probability that this man with these prospects before him would attempt at Hoboken to leave that vessel, and if so, had the officers of the vessel imposed upon them the duty of exercising a greater precaution to prevent his leaving the vessel than to prevent other members of the crew from leaving the vessel? These are questions, and fair questions to consider. The captain himself testifies that he gave instructions to the first officer to let this man Rockstroh out of the room in which he had been confined, he said, to let him go to work. The first officer testifies that after the steerage passengers had left the vessel on Sunday he sunlocked the door and let Rockstroh out; that he did not see him take anything away, nor did he see him leave the vessel, but he says he found out that he had left the vessel on Monday. The first officer further says, in his cross-examination, that no orders were given to detain the man on the vessel; that no arrangement had been among the officers to keep him aboard, and that no precautions or special orders concerning Rockstroh had been given by any officers of the vessel. It appears by his testimony that Rockstroh left the vessel on Sunday with some of his

things, returned to the vessel and got some other things of his, and also that he returned on Monday, the next day, a third time to the vessel and got the remainder of his things, and that on none of these occasions was he stopped.

You may, perhaps, feel that you ought not to rely upon the testimony of Rockstroh, unless you find it corroborated by the testimony of others in the case. He is the only witness in behalf of the Government, and it is entirely proper that you should look for corroboration for anything that he has testified to before coming to the conclusion that the defendants in these two cases are guilty.

Now this man, Rockstroh, says that he left the vessel on Sunday; that he also returned to the vessel on Sunday and got some of his things and left it a second time, and that he returned on Monday the third time. He says that on Monday when he returned to the vessel the third time—I should probably say returned to it the second time, afterwards he left it the third time, he went aboard the vessel; he says he still had a small valise and an instrument there and he went for them. He says he saw the Captain and the Captain was walking toward the shore as he. Rockstroh, went aboard. He says the Captain saw him and asked him whether he hadn't gone away yet, that he said: "Art thou not gone yet?"

Now, to some extent Rockstroh is corroborated by the Captain himself. The Captain says that he went away to Long Island on Sunday; that he came back to the vessel on Monday, and as he was coming back to the vessel he saw Rockstroh on the pier, some distance from the vessel; that he said to Rockstroh, "Why don't you go on board?" He

also said that he didn't know that he, Rockstroh, contemplated going away, but he admits that he did say to him "Why don't you go aboard?" With the knowledge that the Captain had of the charge that had been made against this man on the preceding Saturday, this being Monday, remembering that he had given the order to lock this man up on the preceding Saturday, and had kept him locked up until after the vessel had reached the dock Sunday, he now meets this man Rockstroh where he, the Captain, evidently believed he ought not to be, for he said, according to his own statement, "Why don't you go aboard?"

Did the Captain then, and did the first officer, who was in charge of the vessel while the Captain was away, use due precaution to prevent this man escaping? That is the question for you.

Now the first officer admits that he discovered on Monday that Rockstroh had left the vessel. He says that it was his business to report the fact to the superintendent and also to the German consul. He says that he did report to the German consul on the following Friday after the discovery that this man had escaped on Monday. He says: "I reported the desertion to the German consul on Friday." He also says that he reported to the superintendent on Saturday. That is nearly a week after the vessel arrived, five days after he had discovered that the man had left the vessel and on the very day that the vessel sailed, the report being made just before the vessel sailed. This is the report to the superintendent. The superintendent was right there on the pier. The superin-

tendent was Conrad J. Schoch, and no report was made to him though he was right there and though he was within easy access all that period. Does that throw any light upon the question as to whether due precautions were taken to prevent this man's escape? It is a question for you to consider. It is admitted, of course, I won't say admitted, but it is not denied, that this man Rockstroh was never examined by any immigrant officer, and that he never secured the permission of any immigrant officer to land.

I am asked by the defendant to make certain charges to you, which I will pass on now. The first request relates to the subject-matter of the first count and I presume is not insisted upon.

Mr. WHEELER. No.

The COURT. I will not charge that. The second request is as follows:

> The statute under which the defendant has been indicted does not forbid officers of vessels to land their crews under reasonable regulations.

That is true, and I so charge. The act of 1903, which forbids the landing of aliens, is not to receive so rigid a construction as to compel the crews on vessels that trade between this country and foreign countries to remain on the vessels and not permit them to come on shore at all when they are lying in port here in our country. The members of the crew may go on shore within the inclosure that is provided for them and they do their proper work there within the inclosure about the piers and docks.

The third request is one that also relates to the first count and I presume is not insisted upon, and

therefore will not be charged. The same is true of the fourth request. The fifth request reads thus:

> It is unlawful for a German alien seaman whose term of service has not expired to quit the service of the vessel without the consent of the master and also of the German consul. The doing so is desertion.

There is evidence in the case to prove that that is a fact and there is no evidence to contradict it, and I charge you that that is the law.

The sixth request is as follows:

> The most of section 18 of the immigration act, under which the defendant has been indicted, can be construed as requiring is that such precautions should be taken to prevent an alien seaman from leaving the ship, giving up the sea, and becoming an inhabitant of the United States, as a reasonable man under the circumstances would think to be necessary.

I think that is a correct statement of the law and I think that is substantially what I have stated to you. The law says due precaution. The language used here in this request is that the precaution should be such as a reasonable man under the circumstances would think to be necessary. That is, as I understand the request, such as a reasonable man would think to be necessary, in view of the law which prescribes his duty. It must be due precaution, and, as I have stated before, due precaution depends upon the circumstances of the case, and due precaution to prevent a member of the crew from landing who is charged with com-

mitting a crime, may be greater than due precaution to prevent the landing of any other member of the crew.

The seventh request is as follows:

> The precautions required by section 18 of the immigration act of 1903, under which defendant has been indicted, must be in proportion to the circumstances and requirements of the different kinds of commerce.

That is true. You should also further take into consideration the other elements which I have mentioned to you.

The eighth request is as follows:

> These precautions should be no more rigorous in the case of the immigrant passengers than in the case of seamen.

I am not willing to say that they should be more rigorous. I am willing to say that it does not follow that the precautions taken with respect to immigrant passengers are not necessarily the same as those taken with respect to the members of the crew of the vessels. I think I have already made clear to you my views as to that point and I need not add anything further to that.

The ninth request is as follows:

> The captain and officers of steamships forming part of a regular line plying to and from American ports are not required to confine their seamen on board while the ship is in port, but may give them permission to move about within the inclosure belonging to such line.

That I have already substantially stated, and that is true.

The tenth request is as follows:

> Section 18 of the act under which the defendant is indicted provides "that it shall be the duty of the * * * officers * * * of any vessel bringing an alien to the United States to adopt due precaution to prevent the landing of any such alien from such vessel at any time or place, other than that designated by the immigration officers." In the port of New York Ellis Island is the place designated for the landing of aliens by the immigration officers. It is not intended that the crews of all vessels should be kept on shipboard. It is not intended that they should be landed at the place designated for the landing of aliens by the immigration authorities. Therefore crews of vessels are not included in the word "aliens" as used in section 18, and the defendant can not be convicted under that section.

I decline to charge that.

The eleventh request is as follows:

> Defendants had no right to imprison Rockstroh while he was in port.

I will not charge that in those words. If it were necessary to imprison him, if it seemed to be under the circumstances necessary to imprison him in order to prevent his landing on American soil and remaining here, and passing outside of their inclosure, then due precaution would require them to imprison him.

The twelfth request is:

> Under section 19 of the immigration act the United States has the power to send Rockstroh back to the country from whence he came. Defendants have no such power.

That is true.

The thirteenth request is:

> Under section 18 of the immigration act it is not landing an alien to allow him to go on the pier or within the steamship company's inclosure.

That is true, as I have already explained to you. Employees of vessels may go into the inclosure upon the dock for the purposes of their business.

The fourteenth request is:

> Landing an alien means to allow him to depart from this inclosure and mingle with the inhabitants on shore and become one of them.

That is true, and I so charge. With the statement that I have so made concerning the facts and the law the case is submitted to you.

(The jury then retired.)

Mr. WHEELER. We except to that part of the charge in which the court said: "That Rockstroh was unlawfully here, that is not disputed," on the ground that if Rockstroh had declared his intention to become a citizen of the United States under the act relating to naturalization, he was lawfully here.

The COURT. Take your exception.

Mr. WHEELER. Also to the charge that the act applied to members of the crew—the act under which the defendants are indicted.

The COURT. Take your exception.

Mr. WHEELER. Also to that portion of the charge that relates to an interview between Rockstroh and the captain on the afternoon of Monday, stating that Rockstroh to some extent was corroborated by the captain, as to what occurred at that interview.

The COURT. Take your exception.

Mr. WHEELER. We except to the refusal to charge the tenth request and the refusal to charge the eleventh request.

The COURT. Take your exception.

[The defendant was acquitted.]

United States District Court, District of New Jersey.

THE UNITED STATES OF AMERICA *v.* OTTO CUPPERS.

(On indictment for unlawfully landing an alien.)

TRENTON, N. J., *May 11, 1906.*

Transcript of the charge to the jury delivered in the trial of the above cause, at the Government building in the city of Trenton, by his honor, William M. Lanning, one of the judges of the United States District Court for the District of New Jersey.

Present: Mr. John B. Vreeland, district attorney, and Mr. H. B. Lindabury, assistant district attorney, appeared for the Government. Messrs. Bedle, Edwards and Holmes, and Edwin W. Smith appeared for the defendant.

CHARGE.

LANNING, J.:

GENTLEMEN OF THE JURY: You doubtless will agree, as I do, with the statement made by counsel for defendant that this is an important case. All cases of this sort are important. We have over a million immigrants a year coming to our land from foreign lands, and Congress has passed certain laws regulative of the coming in of persons from other

countries to our country, and it is your duty and my duty to give due effect to those laws.

It is the general policy of the United States, as shown by the acts of Congress, to regulate immigration, that certain classes of undesirable immigrants shall be excluded and prevented from landing here. In furtherance of this policy Congress has provided that idiots, insane persons, epileptics, paupers, professional beggars, persons afflicted with loathsome or dangerous or contagious diseases, and various other classes of persons shall be excluded from landing here in this country.

In order to give effect to those laws an immigration bureau has been established and inspectors of immigration have been provided whose duty it is to examine alien immigrants and ascertain whether or not they are within the prohibited classes, and the duty has been imposed upon officers, owners, and agents of vessels bringing aliens to the United States not to land aliens or permit them to land at any time or place other than that designated by the immigration officers.

Now the section with which you are especially concerned in this case reads as follows:

> That it shall be the duty of the owners, officers, and agents of any vessel bringing an alien to the United States to adopt due precautions to prevent the landing of any such alien from such vessel at any time or place other than designated by the immigration officers, and any such owner, officer, agent, or person in charge of such vessel who shall land or permit to land any alien at any time or place other than that designated by the immigration officers, shall be deemed guilty of a misdemeanor.

It is on that section that the second count of the indictment in this case is founded. You have nothing to do with the first count; you deal only with the second count.

Now, this section that I have just read you makes it an offense for the officers, agents, or owner of a vessel to land or permit to land at any time or place not designated by the immigration officers, without having adopted due precaution to prevent the landing of such alien or aliens. If, therefore, they land an alien or permit him to land at any time or place other than that designated by the immigration officers, without having adopted due precaution to prevent such landing, they become liable to the penalties imposed by the act and are guilty of a misdemeanor.

Now, what constitutes due precaution is to be determined by the circumstances existing in each case. It is not possible for me to lay down any definition which would define what would constitute due precaution in all cases. What might constitute due precaution in one case might not in another.

So that, as I have said, each case must be determined from the facts of the circumstances existing in that case. The statute means that the officer or agent or owner shall adopt such precautions to prevent the landing of an alien as his duty under all circumstances requires, including the duty imposed upon him to see that the law is obeyed. Now, did Captain Cuppers in this particular case, under the circumstances, do all that a man who is skilled and experienced in the business in which he was engaged should reasonably do under the circumstances of the case to prevent the landing of a

member of his crew, in compliance with the requirements of the immigration laws set out in the section which I have read to you?

Now, I think this is a just requirement. It means that the Captain, owners, and agents of the vessel must do what men who are qualified and equal to the position in experience, training, and technical knowledge would do under the circumstances disclosed by the evidence in this case to prevent the illegal landing of an alien. It is the duty of an officer to bring in and exercise his authority and experience, and to adopt all such measures and safeguards as would be likely to prove reasonably effective under the circumstances to prevent the illegal landing of aliens, and he has no more right to wink at such landing, or passively to permit it, than he would have to actively assist in the illegal landing of an alien. He is only excused when he has adopted and exercised due precaution to prevent the landing.

Let me not be misunderstood: I am not willing to say that this section of the law which I have read you, or the law relating to immigration as applied to the landing of alien members of the crew, requires that the captain or officers should be held liable in a case where they had adopted due precaution to prevent the landing of a member of the crew at any time or place other than that designated by the immigration officers. I do not mean to say that the owners or officers of a vessel insure the United States against the unlawful landing of aliens. That is not the construction I give to the act; to give such interpretation of it would be unduly harsh and severe, but the construction I have already outlined is not harsh or severe.

So, if you find from the evidence in this case, either that no precautions at all were taken by the defendant in this case, Captain Cuppers, to prevent the landing of this alien, or that due precautions as I have defined them, were not adopted under the circumstances of the case, then you should find the defendant guilty under the second count of the indictment.

Now, from what I have said, you will observe that I have construed the act, or the section of the law which I have read, to cover the case of the illegal landing of a member of the crew; or rather, I should say, that it may cover the case of the landing of a member of the crew. The defendant in this case claims that it does not apply to the crew of the vessel; that is, that the act does not apply to the crew of the vessel. But to hold this, it seems to me, would create a gap in the law which might and probably would be taken advantage of to land aliens in large numbers in this country, without observing the provisions of the immigration laws. It would permit the possibility of aliens working their passage as members of the crew across the ocean; would permit them to land without inspection by the immigration officers, and thus open the door to evils which the act is intended to prevent.

Now, if I should rule as the defendant has requested me to do in your presence, I want to say to you that the Government would have no redress in case I committed an error, but ruling as I do, and charging you that it is for you to determine whether due precautions were exercised in this case or not, then if you should find the defendant guilty, and I have committed an error in my charge to you, the

defendant is not remediless; he can appeal and have my error corrected by a higher court. But if I should construe the act as the defendant has requested me to do, then it would be your duty to find a verdict of not guilty, and in that case the United States could not appeal, and there could be no review of my decision in case I was in error.

Now, with these remarks, I want to call your attention just briefly to the facts in the case: This man Lutzow signed a contract with the North German Lloyd Steamship Company over in Germany for a year to work on shipboard for 35 marks a month and, as I understand it, clothing. His compensation was to be paid to him monthly and, according to the evidence, on the other side; that is, in Germany. On his very first voyage, it appears, on landing at Hoboken, he left the vessel, as the defendant's counsel says, deserted the vessel, and that is a fair word to use. He did desert, but it doesn't follow that merely because he did desert he was not permitted to land within the meaning of the eighteenth section of the act which I have read to you.

Now, were due precautions taken? He left that vessel, according to his statement, finding no guard or watchman at the gangplank, no guard or watchman anywhere on the vessel or off the vessel, no one who asked him where he was going or what he was doing, and that in spite of the fact that on a preceding voyage when the *Wilhelm der Grosse* was at Hoboken, 18 men, members of the crew, deserted. That was between March 31 and April 1, 1905; and the next succeeding voyage, on May 8, 1905, when the *Wilhelm der Grosse* was at Hoboken, 24 men deserted from the crew, and on the

next succeeding voyage, when the *Wilhelm der Grosse* was at Hoboken, June 5, 1905, 28 men of her crew deserted, and on this voyage, July 1 and 2, 24 men deserted, 7 on July 1, and 17 on July —, or at least those were the dates when the records of the desertion were made in the log book. Now, Captain Cuppers knew this, for, if my memory is not at fault, the testimony shows that the record in the log book at the close of all of these desertions was signed by Captain Cuppers; he had notice of it, and knew that these men were escaping, had been escaping from that vessel of which he was a captain on these several voyages, when the vessel arrived at Hoboken. Knowing that, did he adopt due precautions? Was he bound to do nothing more than he did on June 29, when that vessel arrived at Hoboken, knowing that so many men had deserted from the crew when the vessel had previously landed at Hoboken; ought he to have done something more than he did to prevent members of the crew from landing and escaping from the vessel? That is a question for you to decide. I say again, that the owners and officers of this vessel, that Captain Cuppers was not bound to adopt such measures as would amount to an insurance to the United States that nobody should land, but he was bound to adopt due precautions as a reasonable man qualified for his position, under such circumstances, would have taken. Did he do it?

Something has been said to the effect that there was no defense offered in this case. You have nothing to do with that; you can't draw any inference against Captain Cuppers merely because he was not sworn, or because no other witnesses were sworn for the defense. It is the duty of the Government to make out its case, and the defendant

had a right to rest his case on the testimony offered by the Government, and you must be satisfied with the evidence that the Government has offered that the defendant is guilty, before you would be justified in rendering a verdict that he is guilty.

Then, too, if there be any reasonable doubt about the case, the defendant is entitled to the benefit of that doubt, for the burden of proof is upon the Government to prove the case, as I have already stated.

The whole case centers around that question whether due precautions were taken. It has been summed up by counsel on that theory, and that is the proper theory upon which the case must be presented to you. If you are satisfied that the defendant, the Captain of this vessel, did use due precaution, if you can reach that conclusion under the evidence of the case, then you will have to find a verdict of not guilty. If, on the other hand, you are satisfied he did not, you will have to find a verdict of guilty.

Mr. HOLMES. I merely want to call your attention to what you said about Lutzow, that there was no guard and he merely walked off. Lutzow's testimony was that he did not see anybody; not that there was no guard, but that he did not see anybody.

The COURT. I think you are right about that, that he didn't see anybody, and that no one asked him where he was going.

(The jury then retired.)

Mr. HOLMES. I except to the refusal of the court to charge as requested, except so far as the court has charged the requests.

Exception granted.

Also to the charge of the court wherein the court charged that it was the duty of Captain Cuppers to

prevent the landing of his crew in compliance with the requirements of the immigration laws.

The COURT. You may have an exception as to what I said on that point.

Mr. HOLMES. The contention being that the act does not apply to the crew of the ship.

The COURT. Yes.

Mr. HOLMES. I also except to what the court said on the construction to be placed on the act, in substance that the act was to prevent a condition of affairs which might arise because it held not to apply to the crew, then, or in substance that, that there could be brought a flood of immigrants and there would be a gap in the law. My position is, that it is for Congress to legislate on that subject and cover the gap.

Also to the court's statement to the jury in regard to the question of appeal.

Also that that part in which the court said it does not follow because he deserted that he was not permitted to land within the sense of the law. Whatever the court said on that subject.

Exception granted.

DEFENDANT'S REQUESTS.

(1) That the burden is on the Government to prove that the defendant did not adopt due precautions to prevent the landing of the seaman Lutzow, and the jury must find from the evidence that due precautions were not adopted.

(2) That due precautions mean only such precautions as a reasonably careful man would adopt to carry out the duty imposed by the statute.

(3) That there is no requirement in the statute to, at all hazards, keep the alien upon the ship, but

that only a faithful and careful effort to carry out the duty imposed is required.

(4) No inferences against defendant merely because he was not sworn.

[The defendant was acquitted.]

United States District Court, District of New Jersey.

THE UNITED STATES *v.* HEINRICH BRANDT.

(On indictment, etc.)

TRENTON, N. J., *May 15, 1906.*

Transcript of shorthand notes taken of the judge's charge and the motion to dismiss at the trial of the above case before his honor Joseph Cross, one of the judges of the United States District Court, and jury, at the United States court-house in the city of Trenton.

Mr. John B. Vreeland, the district attorney, appeared on behalf of the Government. Mr. George F. Hobart, of the firm of Collins & Corbin, appeared on the part of the defendant.

After the case on the part of the Government was declared closed, Mr. Hobart made the following motion:

Mr. HOBART. If your honor please, I ask for peremptory instructions in favor of the defendant on these grounds:

1. The defendant is not the master, agent, owner, or consignee of the vessel within the meaning of the statute upon which the indictment is found.

2. There is no evidence that the defendant brought into or landed in the United States the person known as Albert Schroeder.

3. There is no evidence that Schroeder was an alien immigrant within the meaning of the statute; that is, no evidence that he came to the United States for the purpose of taking up his permanent residence, the evidence being that he didn't want to stay in this country.

4. Because the evidence shows that Schroeder was a member of the crew of the steamship *Pretoria* under contract to return to Hamburg, and the statute in question does not apply to a case of this kind.

The COURT. That is not ni question in this case.

Mr. HOBART. He said he had signed articles to return to Hamburg.

5. Also, that the evidence is that Schroeder was a deserter, and, therefore, the act does not apply.

6. There is no evidence that the defendant, in the words of the indictment, "knowingly" brought Schroeder into the United States or landed him there.

7. There is no intent proved on the part of the defendant to commit the crime alleged.

8. The evidence is that Schroeder landed voluntarily without the compulsion of this defendant, or without any act on the part of this defendant.

9. The evidence shows that anything that this defendant might have said or done with regard to the landing of this alien was done without the power or authority to compel the carrying out of his orders, he being merely a subordinate, a machinist, not even at the head of his particular department, and the evidence is simply of a private quarrel between two men employed in this department.

(The motion was then argued.)

The COURT. The objection will be entered; I overrule them and allow an exception. Counsel may proceed.

At the close of the testimony, defendant's counsel made the following motion:

Mr. HOBART. I want to renew my motion for peremptory instructions to the jury. I suppose I have an exception for the refusal of the other.

The COURT. Overruled and exception allowed.

Mr. HOBART. And it will be understood that it is on the same grounds?

The COURT. Yes, I suppose it is on the same grounds. If you have any additional ones, you may state them.

Mr. HOBART. I haven't any additional ones.

Motion overruled, exception prayed and allowed.

CHARGE TO THE JURY.

CROSS, J.:

GENTLEMEN OF THE JURY: The defendant, Heinrich Brandt, stands charged under this indictment with having on the 27th day of October last, at Hoboken, in the county of Hudson and within this district, landed from the steamship called the *Pretoria*, an alien immigrant by the name of Albert Schroeder, and unlawfully brought him into the United States, the said alien Schroeder not having been duly admitted by the immigrant inspector. That is the main element charged.

Now in this case, as in all others, the defendant is presumed in law to be innocent until he has been properly proved guilty, and he must be proved guilty from the evidence beyond a reasonable doubt. That is, if you have any reasonable doubt as to whether he is guilty or not, he is entitled to the benefit of that doubt, and a reasonable doubt is one which would exist after a full and fair consideration of the evidence, and applying your best judgment. If, after having done that, your mind should

remain unconvinced of his guilt, that would be a reasonable doubt. After a fair consideration of the evidence, if your mind is unconvinced, if your judgment is unconvinced of his guilt, that is a reasonable doubt.

The question of the evidence is for your consideration; the credibility of the witness and everything appertaining to the evidence, what it is and its weight, all that is yours.

I would say to you gentlemen, as I have substantially said to another jury in a somewhat similar case to-day, that it is the general policy of the United States, as shown by the acts of Congress relating to immigration, that certain classes of undesirable immigrants should be excluded from landing on its shores, and in furtherance of this policy, the Congress has enacted that certain classes, such as persons afflicted with certain diseases, paupers, criminals, and others should not be permitted to land. In order to accomplish this end, an immigration bureau has been established, and inspectors of immigration have been provided, and it has been made their duty to examine alien immigrants to ascertain whether or not they are within the prohibited classes, and the duty has been imposed upon masters, agents, owners, and consignees of vessels bringing aliens to the United States, by vessels or otherwise, not to land any alien not duly admitted by an immigrant inspector or who is not lawfully entitled to enter the United States.

The section of the act upon which this indictment is based is as follows:

> That any person, including the master, agent, owner, or consignee of any vessel, who shall bring into or land in the United States,

> by vessel or otherwise, or who shall attempt, by himself or through another, to bring into or land in the United States, by vessel or otherwise, any alien not duly admitted by an immigrant inspector, or not lawfully entitled to enter the United States, shall be guilty of a misdemeanor.

This section makes it a misdemeanor for any person, including the master, agent, owner, or consignee of the vessel, who brings into or lands in the United States an alien not duly admitted by an immigrant inspector, or not lawfully entitled to enter the United States, guilty of a misdemeanor. The section of the act is broad enough to include the defendant, and does include the defendant, provided he has violated its provisions; so that the only question you will have to determine in this case is whether you are satisfied from a consideration of all the evidence in the case, beyond a reasonable doubt, that the defendant has landed or brought into the United States an alien contrary to the provisions of said act, that is to say, has landed or brought into the United States an alien not duly admitted by an immigrant inspector, or not lawfully entitled to enter the United States. I do not understand that it is claimed or proved that Schroeder was admitted by an immigrant inspector, and if not, he was for that reason, if for no other, not lawfully entitled to land or enter the United States. It is true that the undisputed evidence shows that he was a member of the crew of the steamship *Pretoria*, but I charge you, as a matter of law, that that circumstance of itself makes no difference, so that your attention will be directed to the question whether the defendant committed the offense of landing or bringing Schroeder into the United States without

his having been duly admitted by an immigrant inspector. If the evidence satisfies you beyond a reasonable doubt that he did this, then he is guilty, in manner and form, as he stands charged in this indictment, otherwise he is not guilty; it is not claimed by the Government, nor does it appear that Schroeder was brought to the dock of the Hamburg-American Line, and there discharged from the vessel, openly and publicly as passengers are discharged, but this was not necessary in order to constitute the offense described in the section of the statute I have just read to you. If you shall find from the evidence, and if the evidence shall satisfy you beyond a reasonable doubt that the defendant, while on the voyage, and especially at or just prior to the time of landing of the alien Schroeder, pursued such a course of conduct, by word and act, toward him, that the reasonable, natural, and probable effect of such conduct upon the mind of Schroeder was that he must get off and quit the vessel and land in the United States, and that by reason thereof he did quit it upon his reaching the dock and so landed, then I charge you that the defendant in law, and within the meaning of the act, landed the alien Schroeder in the United States, because in law the defendant, as everybody else, is presumed to have contemplated the natural and probable consequences of his own acts. Notwithstanding what I have said, the defendant is not guilty unless his conduct toward Schroeder actively and positively caused the landing of Schroeder in the United States. The idea I contend to convey is, that it was not necessary to constitute the offense that the defendant should have actually landed Schroeder or conveyed him down the gang plank and to the gates of the inclosure,

and told him to go, but that if the defendant's conduct naturally, reasonably, and probably produced in the mind of Schroeder, and would have naturally and reasonably produced in the mind of any person of ordinary intelligence and capacity, the conviction that he must get off of and quit the vessel upon its moorings at the dock and land in the United States, and Schroeder acted upon such conviction and landed in the United States, then I say that in law such landing was the act of the defendant, and you may find that the defendant landed Schroeder and that the defendant is guilty of the offense charged.

The merits of this case depend very largely upon the testimony of two witnesses, the defendant and the alien Schroeder. If you believe the defendant's testimony I don't think he should be convicted under this act. I say that to you unhesitatingly—upon his statement of the case.

The question is applying the facts to the law, as I have given it to you, did the defendant land Schroeder in the United States, as I have interpreted the law.

(The jury then retired.)

Mr. HOBART. The defendant desires to note an exception to that part of the charge which construes the law to the effect that it applies to a member of the crew.

The Court granted the exception to the language used.

Defendant also prayed an exception to that part of the charge which was to the effect that if the defendant, while on the voyage, or at or before the landing, by his conduct had such an effect upon Schroeder,

that he landed by reason of such conduct, that that would be a landing.

The court granted the exception to the language used.

Mr. HOBART. And to the same effect that if the defendant's conduct was such as to produce a conviction upon Schroeder that he must quit the vessel, and in accordance thereof he landed, that then the jury might find that the defendant landed Schroeder within the meaning of the statute.

The court granted the exception to the language used.

[The defendant was found guilty, and the case is now on appeal.]

UNITED STATES *v.* JAMES B. HILL.

CHARGE OF THE COURT.

JAMES B. HOLLAND, J.:

GENTLEMEN OF THE JURY: The defendant, James B. Hill, captain of the British steamship *Merion*, has been charged with the violation of the eighteenth section of the act of Congress prohibiting aliens from coming to this country only under certain regulations pointed out by that act. The district attorney in this district has filed an information against him charging him with the offense of landing, or permitting to land, an alien at a place other than that designated by the immigration officers. The act of Congress which prohibits the landing of an alien only as the law directs, is the immigration act of 1903, and it is the eighteenth section of this act which the defendant is charged with having violated. It is as follows:

> That it shall be the duty of the owners, officers, and agents of any vessel bringing an alien

> to the United States to adopt due precautions to prevent the landing of any such alien from such vessel at any time or place other than that designated by the immigration officers, and any such owner, officer, agent, or person in charge of such vessel who shall land or permit to land any alien at any time or place other than that designated by the immigration officers shall be deemed guilty of a misdemeanor, and shall on conviction be punished by a fine for each alien so permitted to land of not less than one hundred or more than one thousand dollars, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment.

You will notice that this act is a very drastic one against the owner or officers or agents of vessels landing or permitting to land any aliens in this country otherwise than pointed out by the act, and this is for the purpose of regulating the coming into this country of aliens. It is intended to enable the immigration officers at the various points in the United States where immigrants land to prevent the coming of undesirable citizens or undesirable persons, such as paupers, or those who are likely to be a public charge, criminals, those afflicted with a contagious disease, and some other class of people that it is found desirable to exclude. It has been found necessary, in order to insure the enforcement of these acts of Congress excluding this class of people, that there shall be a strict enforcement of the immigration laws, and this provision in this immigration act is for the purpose of impressing and compelling owners, officers, and agents of vessels to be cautious in matters of permitting the landing of aliens who come here on their vessel other than at the place where the law specifies. Of course, as is contended by the Government and not denied at all by the defense

here, it is important that this law should be observed and should be enforced; but it is contended by the defense that the defendant did, to the best of his ability, under all the circumstances in this case, endeavor to observe the law. The Government, upon the other hand, alleges and attempts to prove that the defendant neglected to do such things as a skilled person in his situation would have done, or should have reasonably done, to prevent the escape or the landing of aliens that were on his vessel. The defendant was the captain of a steamship having aboard, as the evidence showed, something over 700 passengers, all of whom, I suppose, landed at the proper place, and a crew of some 160. He was in the port of Philadelphia, and as to the aliens who were not members of his crew this case has nothing to do. It appears that the man who landed illegally was an alien employed as one of the crew of this vessel, so that the defendant is charged with having illegally permitted to land a member of his crew. The law requires that the captain or the officer shall adopt due precaution to prevent the landing of aliens. That means he shall adopt due precaution to prevent the landing of alien members of his crew, as well as he is required to adopt due precaution to prevent the illegal landing of aliens who are passengers or who are not members of his crew. But you will readily see, gentlemen of the jury, as reasonable men, that the measure of precaution, or the kind of precaution that a reasonable man should be required to adopt as to aliens who were not members of his crew, would not be required or could not be put into force with reference to aliens who were members of his crew. An officer bringing an alien into this country on his

vessel who was not a member of his crew, being acquainted with the law of the eighteenth section of the act of Congress, as Captain Hill is, would be expected to see to it that that alien who was not a member of his crew did not land at any other place, only those places designated by the immigration officers. At any rate he would be held to adopt very strict regulations and precautions to prevent it, but from time immemorial it has been the practice and the custom, and there is nothing to indicate that Congress, in the enactment of this eighteenth section, intended to abrogate that immemorial usage of permitting sailors shore leave in a foreign port and the other matters of regulation aboard the ship in the management of the crews. Their relative rights and duties would prevent ship officers from adopting the stringent regulations or precautions with regard to members of his crew that he would have a right to put into effect with regard to other aliens who were not members of his crew.

If he had a stowaway aboard his ship the officer has notice that that man is a lawbreaker, to start with; he is unlawfully on his ship. The precaution, we might reasonably say, in such a case, should be the strictest. If he had a passenger upon his ship of course he could not imprison the passenger, but the law would expect him to take at least sufficient precaution to prevent the passenger from landing any other place than where the law designated. But when it comes to a member of his crew he is as much dependent upon many alien members of his crew to do guard duty against the landing, or he is dependent upon probably the members of his crew as a whole to do guard duty at certain times against the others to prevent the landing, and if there is any infidelity in

the members in that regard, of course, after he has stationed his guards and made such rules and regulations as would be reasonable in regard to the landing of these alien members of the crew, he will have done all that he could be expected to do, and if they then desert him, or if a guard on duty connives at the escape of another of the members of the crew, of course it can be said that the captain, unless he takes part in it, if he has done all he could to prevent the escape, has fulfilled the requirements of this act.

In other words, you must take the situation that the officers and owners and agents of the ship are in, and require only of them a reasonable amount of precaution, such as a man skilled in that particular line of business would be expected to adopt under the circumstances. Did Captain Hill do that? The Government proved that a man escaped. His name is Morris Rosenblitt. He is a Russian, a native of Russia. He was not a native of England, although there is no evidence here as to how long he had been a resident of England. He shipped from England on this vessel as an assistant steward. He was an alien to the country under whose flag he shipped on the *Merion*. He was an alien to this country. He was an assistant steward on that vessel. He speaks English. How long he had lived in England we do not know; there is no evidence. The evidence of the Government shows or is to the effect that this man walked off of this vessel, off the gang plank, with a small bundle of clothes under his arm, at half-past 3 in the afternoon. The Government contends that this is a violation of this act. The Government is required not only to prove the actual landing of the man, but the burden of proof is also upon the Government to show that there was not the due precaution observed

by the captain that the law requires, and the Government contends that this evidence establishes that. The Government contends that it has shown that Morris Rosenblitt did leave that vessel and land illegally, not at the place designated by the immigration officers, and that the fact that he walked off with a bundle under his arm at half-past 3 in the afternoon is a fact sufficient from which you should draw an inference that the captain had not adopted the due precaution required by the act. If that was all that was in the case, of course the contention of the Government would be right; but the defendant comes upon the stand and says that he did understand the provisions of this law and obeyed its requirements. The defendant and his other witnesses say that it is the custom of the ship's officers to ascertain the character and inclination of the men as near as they possibly can, and if they find there is any inclination or talk about desertion or leaving, then they are restricted and watched or prevented from landing when they get into port; but that there was nothing to indicate from Morris Rosenblitt's manner or anything that he said or had done which would indicate a disposition to be unfaithful to his agreement and pledge to serve that ship on the return trip. The captain also said, and the other officers showed it to be a fact, that it was the custom to put on guard men to guard the others of the crew, and to watch them in going off and coming on, and to permit them to go off with leave, but it does not appear from the evidence that there was any requirement that a ticket should be produced; and the word of the man going ashore was taken, and if there was nothing to indicate that there was any probability that he would not return

his own word was taken as to his right to go ashore, and he was not prevented.

In other words, the officers at the gang plank who were on watch were left to judge as to the truthfulness of those making application for shore leave as to their right to go ashore, and to judge whether or not there was any indication that there would be no return if permitted. In addition to this, it is in evidence that the company has officers stationed at the outer doors of the dock shed for the purpose of preventing men from escaping. You will say whether or not it is true that this man, at 3 o'clock in the afternoon, walked off without let or hindrance, with a bundle under his arm. Of course there is no direct evidence to the contrary, but there is evidence that there were at both gang planks where the man must have come off—because he said he came off aft—officers to guard the exit of any one at that point, and you will say from the evidence, both of the Government and the defense, which side is really telling the truth. I will submit to you the question whether under all this evidence you think this captain, as a captain of a vessel with 167 men in his crew, did take such precaution as a skilled captain should have reasonably taken to prevent the escape of his men, or the landing of his men. If he did, then you will find a verdict in his favor of not guilty. If you think he did not, if the evidence beyond a reasonable doubt (because this is a criminal case) shows that he did not take such precaution as he should have reasonably taken, then you will find him guilty in accordance with the charge in this information. He is entitled to reasonable doubt, and of course he is entitled to the weight of good character as a seaman. It seems that he has been aboard a vessel for

many, many years, and has been a captain of a vessel for, I believe, six or seven years, he said. He seems like a man—but that is for you—of an upright, straightforward character. You saw him upon the stand, his frank and open manner in telling you exactly how he conducted the affairs of his vessel, and you will say whether or not, under all the evidence, and all the circumstances, he did not adopt such measures as a skilled man should have reasonably adopted, and if he did not, you will find him guilty. If he did, you will say he is not guilty.

The Government has asked me to instruct you as follows:

> If the jury believe that the defendant, Captain Hill, failed to do all that a man who is skilled and experienced in the business in which he was engaged should reasonably do under the circumstances of the case to prevent the landing of Morris Rosenblitt, they should find a verdict for the Government.

This is true.

> The jury are instructed that it was the duty of the defendant to exercise his authority and experience and to adopt all such measures and safeguards as would be likely to prove reasonably effective under the circumstances to prevent the illegal landing of alien members of his crew.

This is true.

Mr. YOCUM. I withdraw the first, second, third, fifth, sixth, seventh, and eighth points, and ask only for the fourth and ninth points, which I suppose will be refused.

The COURT. Yes, the fourth and ninth points of the defendant are refused.

Mr. YOCUM. You need the words "skilled person" in the measure of liability; you said such care as a skilled person should exercise. I except to that portion of the charge.

I also except to that portion of your charge in which you said the law was applicable to a member of the crew.

Finally, in discussing the ticket to go ashore, I take exception to that unless it be qualified by stating the evidence that where a man was not entitled to leave, the quartermasters were given notice of it so he would be stopped. The court said it was entirely in the discretion of the quartermasters on the gang plank whether a man should go or not.

The COURT. I ought to say to you as a further precaution against the illegal landing of these men, Captain Hill said that there was a regulation aboard his vessel that men who did not prove to be men of good behavior and worthy of it were not allowed shore leave. That precaution was adopted for the purpose of permitting only such men to go ashore who were men of appearance, so far as they could learn, and good character, and no doubt for the purpose of only allowing such men to go ashore as he reasonably could expect to be faithful to him and to remain in his crew. It is fair to draw that inference—that these measures were adopted for that purpose—because he said he was thoroughly acquainted with the provisions of this law, and endeavored to try to carry out its provisions.

Mr. BRINTON. I understood that discretion was exercised only by the officer to whom application was made for shore leave, and that of course it would not have any application to a case where a seaman went to the dock without having gotten shore leave,

but simply said "I have shore leave;" in other words, it is an obligation on the part of the officer whose office it was to give shore leave.

The COURT. What the district attorney has said is true; but this method of refusing shore leave to the unruly members of the crew or those who did not deserve it, as I understood the captain, was taken up before coming into port or before any leaves are granted, and those that were not entitled to it were specified, and of course the officer who would be at the gang plank would have notice of those who were being punished for disobedience or for being unruly, by having their shore leave taken away, of which fact the officers and crew would be acquainted, and all others on board the vessel were regarded as worthy of shore leave, and their word would be taken by the officer at the gang plank. You would say whether that is a reasonable precaution, or whether there ought to be more trouble taken by these officers of these large vessels and these large crews. You will pass upon that question.

The points presented by the defendant which were refused by the court are as follows:

> Fourth. If you believe from the evidence that Rosenfelt was bona fide a member of the crew of the steamship *Merion*, who had been on her regularly in connection with his employment, the statute of March 3, 1903, under which the defendant has been indicted, was not intended to apply and does not apply, and your verdict must be for the defendant.
>
> Ninth. Your verdict should be for the defendant.

UNITED STATES *v.* FRANK WATERHOUSE COMPANY.

No. 3389.

DECISION BY THE COURT.

The COURT. Section 20 provides that any alien who shall come into the United States in violation of law or who shall be found a public charge therein from causes existing prior to landing shall be deported, as hereinafter provided, to the country from whence he came, at any time within three years after arrival, at the expense, including one-half of the cost of inland transportation to the port of deportation, of the person bringing such alien into the United States; or if that can not be done, then at the expense of the immigrant fund referred to in section 1 of this act.

Mr. BOGLE. Doesn't that refer to an alien who is here contrary to some of the previous provisions?

The COURT. No; it provides for different cases; it provides for cases of aliens who come into the United States in violation of law or who shall be found public charges therein from causes existing prior to landing. This person is found to be a public charge. If that could be traced to a cause existing prior to his landing, the case would come under section 20 and the Government would have the right to deport him at the expense of the person who brought him here.

Mr. BOGLE. Must there not be some act of bringing him in here before you can inflict the ship with the fine—some act on the part of the ship which is wrongful and in violation of this law?

(After further argument the court rules as follows:)

The COURT. I could agree very readily with Judge Wallace's opinion in regard to stowaways. You can not convict a person of a misdemeanor or a criminal

act without proof of some voluntary act. Where intruders on board a vessel get into the country, and are excluded here, their trespass is as much against the vessel, and more so, than any other object or person. It is like a prosecution we had in this court some years ago where a vessel was proceeded against to be condemned for violating the law, and proof showed that she was handled by a thief who stole her from the owner, and that it was confiscating the property of an innocent victim of a crime to condemn his vessel. This court held that the forfeiture in that case was not incurred. But the ship and the owner of a ship owes some obligation to a member of the crew and has a degree of responsibility by reason of voluntary acts in bringing him to a port where if he deserts and becomes a public charge there is to that extent an infliction upon the country of a burden that does not belong here. In all cases where the members of a crew come into the country afflicted with the smallpox, or any loathsome disease, humanity requires that something must be done for them by somebody, which can not be done on the ship; but the rule of law is that the ship is liable for the expense, at least, of taking proper and humane care of the afflicted members of the crew. Now, in that view of the case, the Secretary of Commerce and Labor has the authority under this law to require this ship to at least meet the expense of taking care of this man. If he could not be put back on the ship and carried around the world without doing violence to our feelings of humanity, then some provision should be made at the expense of the ship for him, and a refusal of the owner and the captain to do anything in the matter brings the case within section 19, which imposes a penalty.

This court has held, in the case of a German vessel which suffered Chinese members of their crew to land in violation of our exclusion law, that the penalty was incurred. That law is somewhat different from this, it is true, but the principle involved is the same. The members of the crew who landed did so without the consent of the captain and officers—they were deserters. Then the decision of the Secretary of Commerce and Labor is conclusive as to this person being one who should be deported; that he came within the excluded class, either on the ground that he was belonging to the class when he came and had no right to enter, or that, by becoming a public charge subsequently from causes existing previously, he was subject to be deported at the expense of the ship as a matter of administration and is not reviewable by the courts. I say this on the authority of the decision of the Circuit Court of Appeals, which is contrary to my individual judgment, because in that case this court was reversed by the Court of Appeals. I have to accept that, however, as being the decision of the court of higher authority as settling the law for this circuit, for the time being at least.

It is the judgment of this court that the defendants are guilty and that they should pay the fine of $300 and costs.

O

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1907.

No. 404.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

NEIL MACDONALD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

INDEX.

	Original.	Print.
Caption	a	1
Indictment	1	1
Motion to quash indictment	5	3
Demurrer to indictment	6	3
Hearing and submission on motion to quash and demurrer to indictment	7	4
Judgment	8	4
Order allowing writ of error	9	4
Assignment of errors	10	5
Opinion	11	5
Clerk's certificate	12	6
Judge's certificate	12	6
Writ of error	13	6
Citation and service	15	8

a UNITED STATES OF AMERICA.

Circuit Court of the United States, Eastern District of Louisiana, New Orleans Division.

THE UNITED STATES, PLAINTIFF in error, *versus* NEIL MACDONALD, DEFENDANT in error,	No. 2536. Criminal docket.

W. W. Howe, esquire, United States attorney, and Rufus E. Foster, esquire, assistant United States attorney, for the United States, plaintiff in error.

Rouse, Grant & Grant, esquires, for Neil Macdonald, defendant in error.

Writ of error to the Circuit Court of the United States for the Eastern District of Louisiana, New Orleans Division, from the Supreme Court of the United States, returnable within thirty (30) days from the tenth (10) day of July, A. D. 1907, at the city of Washington, District of Columbia.

Transcript of record.

1 *Indictment—Filed April 26th, 1907.*

United States of America, Eastern District of Louisiana, New Orleans Division.

In the Circuit Court of the United States, in and for the district and division aforesaid, at the November term thereof, A. D. 1906.

The grand jurors of the United States of America, duly empanelled, sworn, and charged, in and for the district and division aforesaid, at the term aforesaid of the court aforesaid, on their oath present:

FIRST COUNT.

That heretofore, to wit, on the 19th day of August, A. D. nineteen hundred and six, one N. Macdonald, whose first name is to the grand jurors unknown, in the parish of Jefferson, State of Louisiana, Eastern District thereof, and within the jurisdiction of this court, and who was then and there master of the British steamship "Tioga," and which said steamship was then and there lying at South Port, in said parish of Jefferson, State of Louisiana, did knowingly, wilfully, and unlawfully bring into the United States from a foreign country, to wit, from Liverpool, England, to the port of New Orleans, in the district and division aforesaid, and did knowingly, wilfully, and unlawfully land and permit to be landed at the said port of New Orleans, a certain alien, to wit, one Frank Hopewell, who was and had been during the voyage a stowaway on said steamship "Tioga,"

and which said alien was not lawfully entitled to be admitted into the United States, and had been refused admission into the United States and ordered deported to the country from which he came by the proper officers of the Bureau of Immigration of the Depart-
2 ment of Commerce and Labor of the United States at the port of Norfolk, in the State of Virginia, as he the said N. Macdonald then and there well knew, but, nevertheless, the said N. Macdonald, whose first name is to the grand jurors unknown, had, after leaving Norfolk for New Orleans, and at sea, caused the said Frank Hopewell to be signed on the articles of the said steamship "Tioga" as a seaman, and did then and there, to wit, at the time and place aforesaid, unlawfully permit him to land in the United States from the said steamship "Tioga," contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

3 And the grand jurors aforesaid, on their oath aforesaid, further present:

SECOND COUNT.

That heretofore, to wit, on the 19th day of August, A. D., nineteen hundred and six, one N. Macdonald, whose first name is to the grand jurors unknown, in the parish of Jefferson, State of Louisiana, Eastern District thereof, and within the jurisdiction of this court, and who was then and there master of the British steamship "Tioga," and which said steamship was then and there lying at South Port, in said parish of Jefferson, State of Louisiana, which steamship had then and there brought to the United States from a foreign country, to wit, from Liverpool, England, to the port of New Orleans, in the district and division aforesaid, a certain alien, to wit, one Frank Hopewell, and he the said N. Macdonald, unlawfully did not adopt due precautions to prevent the landing of the said alien, Frank Hopewell, from said steamship "Tioga" at any time or place other than that designated by the immigration officers of the United States at the port of New Orleans, but on the contrary, said N. MacDonald did unlawfully permit said alien to land at the port of New Orleans, aforesaid, and to come into the United States at a time and place other than that designated by the immigration officers aforesaid, and when in truth and in fact the said alien, Frank Hopewell, had never been listed or manifested upon the lists of aliens coming to the United States on the said steamship "Tioga," as required by law, nor had any time or place been designated by said immigration officers for the landing of said Frank Hopewell, an alien, as aforesaid, who, nevertheless, was unlawfully permitted to land as aforesaid by said N. Macdonald, and to come into the United States
4 as aforesaid, in violation of law, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

(Signed) RUFUS E. FOSTER,
Assistant U. S. Attorney.

(Endorsed:) No. 2536, United States Circuit Court, Eastern District of Louisiana, at New Orleans. United States versus N. Macdonald. Indictment. Act March 2nd, 1903. A true bill. Emilien Perrin, foreman, April 26th, 1907. Filed April 26, 1907. (Sig.) H. J. Carter, clerk.

5 *Motion to quash indictment.—Filed April 27, 1907.*

United States Circuit Court, Eastern District of Louisiana.

UNITED STATES OF AMERICA
vs.
NEIL MCDONALD. } No. .

Comes now Neil McDonald, through his undersigned attorneys, and moves to quash the indictment herein for the following reasons, to wit:

1. That this honorable court is without jurisdiction in the premises in that defendant is charged in the first count of said indictment with having committed an alleged offense in Norfolk, Virginia, without the jurisdiction of this court.

2. That the first count of said indictment charges defendant with having committed three separate and distinct alleged offenses.

3. That there is no such offense as unlawfully permitting a signed and articled seaman to land in the United States as charged in the first count of said indictment.

4. That the law under which defendant is charged with having committed the offenses set out in said indictment is inapplicable to stowaways.

5. That the second count of said indictment is repugnant to the first count in that the person therein alleged to have been unlawfully permitted to land is described as an alien that had never been listed or manifested, whereas under the first count thereof said person is designated as a regular seaman under signed articles.

6. That the second count of said indictment charges defendant with having committed two separate and distinct offenses.

Wherefore, defendant prays that the indictment be quashed and he be released forthwith.

(Signed) ROUSE, GRANT & GRANT,
His Attorneys.

6 *Demurrer to indictment.—Filed April 27, 1907.*

United States Circuit Court, Eastern District of Louisiana.

UNITED STATES OF AMERICA
vs. No. .
N. MCDONALD.

And the said N. McDonald, in his own proper person, cometh into court here and, having heard the said indictment read, saith:

That the said indictment and the matters therein contained, in

manner and form as the same are above stated and set forth, are not sufficient in law; and

That he is not bound by the law of the land to answer the same; and this he is ready to verify.

Wherefore, for want of a sufficient indictment in this behalf, the said N. McDonald prays judgment, and that by this court here he may be dismissed and discharged from the said premises in the said indictment specified.

7 *Hearing, submission, and motion to quash indictment.*

[Extract from the minutes, April term, 1907.]

NEW ORLEANS, *Tuesday, June 4th, 1907.*

Court met pursuant to adjournment.

Present: Hon. Eugene D. Saunders, district judge.

UNITED STATES
vs. No. 2536.
NEIL MCDONALD.

This cause came on this day to be heard upon the motion to quash the indictment and the demurrer to the indictment filed by the defendant herein on April 27, 1907, and was argued by W. B. Grant, of counsel for the defendant, and by Rufus E. Foster, assistant U. S. attorney for the United States, and submitted, when the court took time to consider.

8 *Judgment.*

[Extract from the minutes, April term, 1907.]

NEW ORLEANS, *Wednesday, June 12, 1907.*

Court met pursuant to adjournment.

Present: Hon. Eugene D. Saunders, district judge.

UNITED STATES
vs. No. 2536.
NEIL MCDONALD.

This cause came on at a former day to be heard upon the demurrer and the motion to quash the indictment filed by the defendant herein, and was argued by counsel and submitted.

Whereupon the court, having duly considered the same, it is now ordered and adjudged that the demurrer and the motion to quash be sustained and that said indictment be dismissed and quashed.

9 *Motion and assignment of errors.—Filed July 1, 1907.*

U. S. Circuit Court, Eastern District of Louisiana, New Orleans Division.

UNITED STATES
vs. No. 2536.
NEIL MCDONALD.

On motion of W. W. Howe, United States attorney, and Rufus E. Foster, assistant United States attorney, and on suggesting error in

the judgment rendered herein June 12th, 1907, and on filing the assignments of errors hereto annexed.

It is ordered that a writ of error be granted to the United States of America in this cause to remove the same to the Supreme Court of the United States, under the statute in such case made and provided, and that the United States be dispensed from giving a bond.

(Signed) EUGENE D. SAUNDERS, *Judge.*

July 1, 1907.

10 U. S. Circuit Court, Eastern District of Louisiana, New Orleans Division.

UNITED STATES
vs. No. 2536.
NEIL MCDONALD.

Now comes the United States of America, through W. W. Howe, United States attorney, and Rufus E. Foster, assistant United States attorney, duly authorized, and applying for a writ of error to remove this cause to the Supreme Court of the United States, makes and offers the following assignments of error in the proceedings and judgment complained of:

1. The court erred in sustaining the demurrer of the defendant and dismissing the indictment.

2. The court erred in quashing the indictment.

And for these errors and others apparent on the face of the record the United States of America prays that said judgment of June 12th, 1907, be reversed and the case remanded for such other proceedings as may be proper, and that such other and further order may be rendered as may be just.

11 *Opinion.—Filed July 12th, 1907.*

United States Circuit Court, Eastern District of Louisiana.

UNITED STATES
vs. } No. 2536.
NEIL MACDONALD.

SAUNDERS, District Judge.

I sustain the motion to quash in this case on the 3d and 4th grounds in said motion. I do not think the provisions of the alien law were intended to apply or do apply to the case of an articled seaman who is an alien. The captain is not, in other words, required to treat his alien articled seamen as intending immigrants. If the lawgiver desires the same precautions taken against alien articled seamen as against aliens offering to immigrate into this country, there should be express legislation on the subject.

Nor do I think it matters that the alien may have come on the vessel as a stowaway. That fact does not necessarily indicate an

original intention to come to this country as an immigrant. Men go on board as stowaways just as often for adventure or to force the employment of themselves as sailors as to procure passage to a country into which they intend to immigrate.

Criminal laws are stricti juris. Only those acts are criminal which are expressly made so.

In this circuit Judge Pardee many years ago took this view of the matter (U. S. vs. Saudrey, 48 Fed. Rep., p. 550), and I consider it the right view, and therefore follow it, instead of the decision in Taylor vs. U. S. (152 F. R., p. 1).

12 United States of America, Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Henry J. Carter, clerk of the Circuit Court of the United States, for the Fifth Circuit and Eastern District of Louisiana, do hereby certify that the foregoing 11 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, and assignment of errors, in the case of the United States versus Neil Macdonald, No. 2536 of the criminal docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 12th day of July, A. D. 1907.

[SEAL.] H. J. CARTER, *Clerk.*

I, Eugene D. Saunders, United States judge for the Eastern District of Louisiana, do certify that Henry J. Carter, whose name is signed to the above certificate as clerk of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 12 day of July, A. D. 1907.

EUGENE D. SAUNDERS, *Judge.*

13 UNITED STATES OF AMERICA, *ss.*

The President of the United States to the honorable the judges of the Circuit Court of the United States in and for the Fifth Circuit, and holding sessions for the Eastern District of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between the United States of America and Neil Macdonald, a manifest error hath happened, to the great damage of the said United States of America, plaintiff in error, as by its complaint appears.

We being willing that error, if any hath been, should be duly cor-

rected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 30 days from the date hereof, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 10th day of July, in the year of our Lord one thousand nine hundred and seven.

[SEAL.] H. J. CARTER,
Clerk of the United States Circuit Court
for the Eastern District of Louisiana.

Allowed by
EUGENE D. SAUNDERS, *Judge.*

14 (Indorsed:) United States Circuit Court. No. 2536. United States versus Neil Macdonald. Writ of error. No. . U. S. Circuit Court, Eastern District of Louisiana, New Orleans Division. Filed Jul. 10, 1907. H. J. Carter, clerk.

15 The United States of America, Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to Neil Macdonald, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, D. C., within 30 days from date hereof, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said United States of America, plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, this 10 day of July, in the year of our Lord one thousand nine hundred and seven.

EUGENE D. SAUNDERS, *Judge.*

Service of the above citation accepted July 10, 1907.

NEIL MACDONALD,
By WM. GRANT, *His Att'y.*

16 (Indorsed:) United States Circuit Court, Eastern District of Louisiana. No. 2536. United States vs. Neil Macdonald. Citation on writ of error. Marshal's return. No. . U. S. Circuit Court, Eastern District of Louisiana, New Orleans Division. Filed Jul. 10, 1907. H. J. Carter, clerk.

(Indorsement on cover:) File No. 20807. E. Louisiana. C. C. U. S. Term No. 404. The United States, Plaintiff in Error, vs. Neil Macdonald. Filed July 17, 1907. File No. 20807.

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In the Supreme Court of the United States.

OCTOBER TERM, 1907.

THE UNITED STATES, PLAINTIFF IN ERROR, v. NEIL MACDONALD. } No. 404.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

Plaintiff in error in this case has been granted leave to file an additional brief on the first point raised in the brief filed by the defendant in error. That point is stated in the latter brief as follows:

> 1. A writ of error does not lie in behalf of the United States from the judgment of the Circuit Court in favor of the defendant in error.

A. The learned counsel for the defendant in error cites no case directly in point to sustain this contention, but relies entirely on the case of the *United States* v. *Sanges*, 144 U. S., 310, which merely holds that under the judiciary act of 1891 the court was without

jurisdiction in a criminal case where a writ of error had been sued out by the United States.

In the opinion in that very case the court recognized that a statute, granting to the prosecution a writ of error, might be passed without infringing any provision of the Constitution.

On page 312 the following language appears:

> But whatever may have been, or may be, the law of England upon that question, it is settled by an overwhelming weight of American authority, that the State has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, *except under and in accordance with express statutes*, whether that judgment was rendered upon a verdict of acquittal, or upon the determination by the court of a question of law.

On page 318, we find the following:

> In many of the States, indeed, including some of those above mentioned, the right to sue out a writ of error, or to take an appeal in the nature of a writ of error, in criminal cases, has been given to the State by positive statute. But the decisions above cited conclusively show that under the common law, as generally understood and administered in the United States, and in the absence of any statute expressly giving the right to the State, a writ of error can not be sued out in a criminal case after a final judgment in favor of the defendant, whether that judgment has been rendered upon a verdict of acquittal, or upon a determination by the court of an issue of law.

> In either case, the defendant, having been once put upon his trial and discharged by the court, is not to be again vexed for the same cause, *unless the legislature, acting within its constitutional authority, has made express provision for a review of the judgment at the instance of the Government.*

While the italicized portions in the opinion quoted above are dicta, it is clear the court intended to hold merely that Congress had not given the Supreme Court jurisdiction to entertain an appeal in a case similar to the *Sanges case*. It very clearly did not intend to hold that a statute giving the Government a right to appeal could not be constitutionally adopted. It is significant also that Mr. Justice Gray, who delivered the unanimous opinion of the court in that case, concurred, as a judge of the Supreme Judicial Court of Massachusetts, in an opinion of Chief Justice Chapman, in which it was stated:

> In the former prosecution the permission which was given to the defendant to withdraw his plea of not guilty and to file a plea of misnomer in abatement, and the abatement of the indictment on that ground, relieved him from being put in jeopardy. (*Commonwealth* v. *Sholes*, 13 Allen, 554; 1 Bishop Crim. Law, 865.) The proceedings in that case are therefore no bar to this prosecution for the same offense. (*Commonwealth* v. *Farrell*, 105 Mass., 189, 191.)

B. It is conceded that the writ of error in the case at bar was sued out in accordance with the provisions

of chapter 2564 of the laws of 1907, but it is contended that this act is itself in violation of that part of the fifth amendment which provides that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. The material part of the act of 1907 reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases in the following instances, to wit:
>
> From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.

The rule is well stated in Cooley's Constitutional Limitations, seventh edition, page 467:

> A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction and a jury has been charged with his deliverance. And a jury is said to be thus charged when they have been impaneled and sworn. * * *
>
> If, however, the court had no jurisdiction of the cause, or if the indictment was so far defective that no valid judgment could be

> rendered upon it, or if by any overruling necessity the jury are discharged without a verdict, which might happen from the sickness or death of the judge holding court, or of a juror, or the inability of the jury to agree upon a verdict after reasonable time for deliberation and effort, or if the term of the court as fixed by law comes to an end before the trial is finished or the jury are discharged with the consent of the defendant, expressed or implied, or if, after verdict against the accused, it has been set aside on his motion for a new trial or on writ of error, or the judgment thereon been arrested—in any of these cases the accused may again be put upon trial upon the same facts before charged against him, and the proceedings had will constitute no protection.

That the law is here laid down correctly is shown by a long line of cases in which it has been uniformly held that where a person indicted for any offense is not put upon his trial before a jury, but the case is disposed of by a decision on some preliminary question, there has been no jeopardy. The common-law rule is stated as follows in *Vaux's case*, 4 Coke, 44a:

> But when the offender is discharged upon an insufficient indictment, there the law has not had its end; nor was the life of the party, in the judgment of the law, ever in jeopardy; and the wisdom of the law abhors that great offenses should go unpunished, which was founded without question upon these ancient maxims of law and state: Maleficia non debent remanere impunita, et impunitas continuum affectum

> tribuit delinquendi, et minatur innocentes qui parcit nocentibus. So if a man be convicted either by verdict or confession upon an insufficient indictment, and no judgment thereupon given, he may be again indicted and arraigned, because his life was never in jeopardy, and the law wants its end; and afterwards, upon a new indictment, the said Vaux was tried and found guilty, and had his judgment and was hanged.

In the case of the *State* v. *Nelson*, 26 Indiana, 368, the court says:

> It is everywhere conceded that the "jeopardy" contemplated does not begin until a petit jury is sworn and "charged" with the offense. (*Epes' case*, 5 Grat., 676; *Hines* v. *The State*, 8 Humph., 597.) So if the jury be afterwards discharged on account of the illness or death of a juror or of the judge, or because the term of the court has expired, it is settled that the prisoner has not been in "jeopardy," and may again be put upon his trial.

In *White* v. *State*, 49 Alabama, 344, at page 347, it is said:

> A demurrer to this plea for insufficiency was sustained. The indictment set out in the plea is so defective that, if the defendant had been convicted under it, he could have had any judgment entered up against him reversed. It is neither a charge of burglary, nor of larceny, nor of an attempt to commit either. When this is the case, there is no jeopardy, and the solicitor is authorized to ask for a nol. pros. and to indict anew.

In *United States* v. *Perez*, 9 Wheat., 579, Mr. Justice Story, speaking for the court, said:

> We are of opinion that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defense. We think that in all cases of this nature the law has invested courts of justice with the authority to discharge a jury from giving any verdict whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act or the ends of public justice would otherwise be defeated.

The rule is thus stated in Bishop on Criminal Law, seventh edition:

> SEC. 1014. Proceedings which do not amount to jeopardy: There is a sense in which a person is in jeopardy from the moment when he incurs legal guilt, since he is then liable to be indicted. Clearly, however, the constitutional guaranty does not refer to the jeopardy created by the crime, which the defendant commits himself, but by the prosecution, which is carried on by another power. And the mere commencing of the proceedings does not put him in jeopardy while there is no jury, who alone can decide the question of guilt. Therefore,
>
> When jeopardy begins: Then, on the completing and swearing of the panel, the jeopardy of the accused begins; and it begins only when the panel is full. Until full, the jeopardy is not perfect. In other words,

> SEC. 1015. (Continued.) Without a jury, set apart and sworn for the particular case, the individual defendant has not been conducted to his period of jeopardy. But when, according to the better opinion, the jury, being full, is sworn and added to the other branch of the court, and all the preliminary things of record are ready for the trial, the prisoner has reached the jeopardy from the repetition of which our constitutional rule protects him.

In the *United States* v. *Gibert*, 2 Sumner, page 19, at page 39, Mr. Justice Story said:

> Thus Staundford, in his Pleas of the Crown (lib. ii., ch. xxxvi, pp. 105, 106), says ("Home, per common leye, ne mittera sa vie deux foits in jeopardie de trial per un mesme felonie, sinon que sort en ascun especial cas de quel jeo dirra apres"): A man shall not by the common law put his life twice in jeopardy of trial for the same felony, except it shall be in some special case, of which I shall hereafter speak. And the excepted case, to which he here alludes, he states in the same chapter to be where there is not in the indictment sufficient matter to constitute felony in point of law. And he applies his doctrine directly to the case of a plea of a former acquittal, grounding the sufficiency of it as a bar upon the above maxim. And he then states that if the acquittal was upon an insufficient indictment it is no bar to a second indictment for the same offense (eo que in tiel cas il ne unique mittoit so vie in jeopardie sur le matter), because his life has never been in

jeopardy upon the matter. And the like doctrine may be traced up as early as the age of Bracton.

See also *People* v. *Webb*, 38 Cal., page 467, at page 477; Mr. Justice Clifford in *Coleman* v. *Tennessee*, 97 U. S., page 509, at page 529; *Ex parte Fenton*, 19 Pac. Rep., page 267; *In re McClaskey*, 37 Pac. Rep., page 854, at page 858; *Lovett* v. *State*, 33 Fla., page 392.

The doctrine then seems to be entirely settled that there is no jeopardy until a jury has been impaneled and the defendant actually put upon trial. In the present case a demurrer to the indictment was sustained, of course, before any jury was sworn. The contention of the Government, therefore, simply follows the law as universally laid down by courts and text writers.

It is therefore submitted that for the reasons set forth in this supplemental brief and in the brief already on file in the case at bar the judgment sustaining the demurrer and the motion to quash the indictment should be reversed.

CHARLES J. BONAPARTE,
Attorney-General.
ALFORD W. COOLEY,
Assistant Attorney-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1907.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
NEIL MACDONALD. } No. 404.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is here on a writ of error to the United States Circuit Court for the Eastern District of Louisiana. The defendant in error, master of the British steamship *Tioga*, was indicted for violation of section 18 of the immigration act of March 3, 1903, which reads as follows:

> SEC. 18. That it shall be the duty of the owners, officers, and agents of any vessel bringing an alien to the United States to adopt due precautions to prevent the landing of any such alien from such vessel at any time or place other than that designated by the immigration officers, and any such owner, officer, agent, or person in charge of such vessel who shall land or permit to land any alien at any time or place other than that designated by the immigration officers, shall be deemed guilty of a misdemeanor, and shall on convic-

> tion be punished by a fine for each alien so permitted to land of not less than one hundred nor more than one thousand dollars, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment, and every such alien so landed shall be deemed to be unlawfully in the United States and shall be deported, as provided by law.

The indictment charges that on the 19th day of August, 1906, the defendant in error, master of the British steamship *Tioga*, which was then and there lying at South Port, Jefferson Parish, La., brought into the United States from England to the port of New Orleans and landed and permitted to be landed at said port a certain alien, to wit, one Frank Hopewell, who was and had been on said voyage a stowaway on said steamship *Tioga*, and that said alien was not lawfully entitled to be admitted into the United States and had been refused admission and ordered deported by the proper officers of the Bureau of Immigration at the port of Norfolk, Va., as the defendant Macdonald well knew, but that nevertheless the said defendant had after leaving Norfolk for New Orleans and while at sea caused the said Frank Hopewell to be signed on the articles of the said steamship *Tioga* as a seaman and permitted him to land in the United States, contrary to the form of the statute, etc.

The second count charged the defendant with having failed to adopt due precautions to prevent the landing of the said alien, Frank Hopewell, from the steamship *Tioga* at any time or place other than

that designated by the immigration officers of the port of New Orleans.

The defendant moved to quash the indictment, and further filed a demurrer to the indictment.

The third and fourth grounds on which the motion to quash was based were as follows:

> (3) That there is no such offense as unlawfully permitting a signed and articled seaman to land in the United States, as charged in the first count of said indictment.
>
> (4) That the law under which defendant is charged with having committed the offenses set out in said indictment is inapplicable to stowaways.

Thereupon the court ordered that the demurrer and motion to quash be sustained on the third and fourth grounds, quoted above, and the indictment was accordingly dismissed.

The opinion of Judge Saunders is very brief and reads as follows:

> SAUNDERS, District Judge.
>
> I sustain the motion to quash in this case on the third and fourth grounds in said motion. I do not think the provisions of the alien law were intended to apply or do apply to the case of an articled seaman who is an alien. The captain is not, in other words, required to treat his alien articled seamen as intending immigrants. If the lawgiver desires the same precautions taken against alien articled seamen as against aliens offering to immigrate into this country, there should be express legislation on the subject.

Nor do I think it matters that the alien may have come on the vessel as a stowaway. That fact does not necessarily indicate an original intention to come to this country as an immigrant. Men go on board as stowaways just as often for adventure or to force the employment of themselves as sailors as to procure passage to a country into which they intend to immigrate.

Criminal laws are *stricti juris*. Only those acts are criminal which are expressly made so.

In this circuit Judge Pardee many years ago took this view of the matter (*United States* v. *Saudrey*, 48 Fed. Rep., p. 550), and I consider it the right view and therefore follow it instead of the decision in *Taylor* v. *United States* (152 F. R., p. 1).

The only issue in the case, therefore, is whether section 18 of the act of 1903 applies to alien seamen.

This question of law is fully discussed in the brief filed in the case of the *United States* v. *Taylor*, which is to be argued with the case at bar, and the attention of the court is respectfully invited to the points made in that brief.

It is to be noted that in the Macdonald case the alien was a stowaway and that a high degree of care was on that account required of the captain. The mere fact that he was a stowaway raises a serious question whether he can be regarded as a bona fide seaman at all.

ALFORD W. COOLEY,
Assistant Attorney-General.

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Office Supreme Court, U. S.
FILED.
OCT 23 1907
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES

No. 404, October Term, 1907

The United States,
Plaintiff in Error,

against

Neil Macdonald,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

This comes up on a writ of error to the Circuit Court of the United States for the Eastern District of Louisiana.

The defendant in error was indicted August 26th, 1907, in the United States Circuit Court for the Eastern District of Louisiana. The indictment was in two counts for alleged offences under the Immigration Law of March 2nd, 1903.

The defendant moved to quash the indictment and also demurred.

The Court gave judgment for the defendant that the demurrer and motion to quash be sustained and the indictment dismissed and quashed (Record, folio 8).

The United States seeks to review this judgment upon writ of error from this Court.

The demurrer was upon the ground of insufficiency (Record, page 3).

The motion to quash (Record, page 3) was upon several grounds, as follows:

1. That this Honorable Court was without jurisdiction in the premises in that defendant is charged in the first count of said indictment with having committed an alleged offence in Norfolk, Virginia, without the jurisdiction of this Court.

2. That the first count of said indictment charges defendant with having committed three separate and distinct alleged offences.

3. That there is no such offence as unlawfully permitting a signed and articled seaman to land in the United States, as charged in the first count of said indictment.

4. That the law under which defendant is charged with having committed the offences set out in the said indictment is inapplicable to stowaways.

5. That the second count of said indictment is repugnant to the first count in that the person therein alleged to have been unlawfully permitted to land is described as an alien that had never been listed or manifested, whereas under the first count thereof said person is designated as a regular seaman under signed articles.

6. That the second count of said indictment charges defendant with having committed two separate and distinct offences.

In giving judgment for defendant, the Circuit Judge rendered an opinion giving his reasons for sustaining the motion to quash. These had to do only with the third and fourth grounds assigned in the motion, being in substance that the Act of March 2d, 1903, is not applicable to articled seamen or to stowaways (Record, page 5).

The indictment is as follows:

"FIRST COUNT: That heretofore, to wit, on the 19th day of August, A. D. nineteen hundred and six, one N. Macdonald, whose first name is to the grand jurors unknown, in the parish of Jefferson, State of Louisiana, Eastern District thereof, and within the jurisdiction of this Court, and who was then and there master of the British steamship *Tioga* and which said steamship was

then and there lying at South Port, in said parish of Jefferson, State of Louisiana, did knowingly, wilfully and unlawfully bring into the United States from a foreign country, to wit, from Liverpool, England to the port of New Orleans, in the district and division aforesaid, and did knowingly, wilfully and unlawfully land and permit to be landed at the said port of New Orleans, a certain alien, to wit, one Frank Hopewell, who was and had been during the voyage a stowaway on said steamship *Tioga* and which said alien was not lawfully entitled to be admitted into the United States, and had been refused admission into the United States and ordered deported to the country from which he came by the proper officers of the Bureau of Immigration of the Department of Commerce and Labor of the United States at the port of Norfolk, in the State of Virginia, as he the said N. Macdonald then and there well knew, but, nevertheless, the said N. Macdonald, whose first name is to the grand jurors unknown, had, after leaving Norfolk for New Orleans, and at sea, caused the said Frank Hopewell to be signed on the articles of the said steamship *Tioga* as a seaman, and did then and there, to wit, at the time and place aforesaid, unlawfully permit him to land in the United States from the said steamship *Tioga*, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

And the grand jurors aforesaid, on their oath aforesaid, further present:

SECOND COUNT: That heretofore, to wit, on the 19th day of August, A. D. nineteen hundred and six, one N. Macdonald, whose first name is to the grand jurors unknown, in the parish of Jefferson, State of Louisiana, Eastern District thereof, and within the jurisdiction of this court and who was then and there master of the British steamship "Tioga", and which said steamship was then and there lying at South Port in said parish of Jefferson, State of Louisiana, which steamship had then and there brought to the United States from a foreign country, to wit, from Liverpool, England, to the port of New Orleans, in the district and division aforesaid, a certain alien, to wit, one Frank Hopewell, and he the said N. Macdonald, unlawfully did not adopt due precautions to prevent the landing of the said alien, Frank Hopewell, from said steamship *Tioga*, at any time or place other than that designated by the immigration officers of the United States at the port of New Orleans, but on the contrary, said N. Macdonald did

unlawfully permit said alien to land at the port of New Orleans aforesaid, and to come into the United States at a time and place other than that designated by the immigration officers aforesaid and when in truth and in fact the said alien, Frank Hopewell, had never been listed or manifested upon the lists of aliens coming to the United States on the said steamship *Tioga*, as required by law, nor had any time or place been designated by said immigration officers for the landing of said Frank Hopewell, an alien, as aforesaid, who, nevertheless, was unlawfully permitted to land as aforesaid, by said N. Macdonald, and to come into the United States as aforesaid, in violation of law, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States."

ARGUMENT.

The defendant in error will argue, that 1) no writ of error lies, 2) that the Immigration Act does not apply, and 3) that the indictment was defective.

I.—A WRIT OF ERROR DOES NOT LIE IN BEHALF OF THE UNITED STATES, FROM THE JUDGMENT OF THE CIRCUIT COURT, IN FAVOR OF THE DEFENDANT IN ERROR.

The Federal Constitution, Sixth Amendment, provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."

In the case of the United States *v.* Sanges, 144 U. S., 310 (1892), it was then held that a writ of error would not lie in behalf of the United States in any criminal case The question arose where a demurrer to an indictment had been sustained. This decision was based upon the ground that at common law no one shall be brought twice into jeopardy for one and the same offence, and

that there was no Federal statute which changed the common law rule and authorized a writ of error in behalf of the United States, the Court saying:

"The decisions above cited conclusively show that under the common law as generally understood and administered in the United States, and in the absence of any statute expressly giving the right to the State, a writ of error cannot be sued out in a criminal case after a final judgment in favor of the defendant, whether that judgment has been rendered upon a verdict of acquittal or upon a determination by a court of an issue of law."

The question, however, of whether or not the provision of the Federal Constitution would interfere with a Federal act authorizing such appeal was not discussed.

Since the above decision a federal statute has been passed (Act of March 2, 1907, 34 U. S. St. at Large, 1246) which in terms provides that a writ of error may be sued out in behalf of the United States from the Circuit Court direct to the Supreme Court in all criminal cases, in the following instances among others:

"From the decision or judgment quashing, setting aside or sustaining a demurrer to any indictment or any count thereof where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded."

"From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy."

There are three sections of the Act of March 2nd, 1903, to which the indictment may refer, Sections 8, 18 and 19.

Section 8 declares that the master of any vessel

"who shall bring into or land in the United States by vessel or otherwise, or who shall attempt by himself or through another to bring into or land in the United States by vessel or otherwise, any alien not duly admitted by the immigration inspector or not lawfully entitled to enter the United States, shall be deemed guilty of a misdemeanor and shall, on conviction, be punished by a fine

not exceeding one thousand dollars for each and every alien so landed or attempted to be landed, or by imprisonment for a term not less than three months or more than two years, or by both such fine and imprisonment."

Section 18 provides that it shall be the duty of the officers of any vessel bringing an alien to the United States to adopt due precautions to prevent the landing of any such alien from such vessel at any time or place other than that designated by the immigration officers, and that any such officer

"Who shall land or permit to land any alien at any time or place other than that designated by the immigration officers shall be deemed guilty of a misdemeanor and shall on conviction be punished by a fine for each alien so permitted to land, of not less than one hundred dollars or more than one thousand dollars, or imprisonment for a term not exceeding one year or by both such fine and imprisonment."

Section 19 directs that all aliens brought into this country in violation of law shall, if practicable, be immediately sent back to the countries whence they respectively came, on the vessels bringing them, and that

"if any master * * * of any such vessel shall refuse to receive back on board thereof * * * such aliens or shall neglect to detain them thereon or shall refuse or neglect to return them to the foreign port from which they came * * * such master * * * shall be deemed guilty of a misdemeanor and shall on conviction be punished by a fine of not less than $300 for each and every such offence."

The draughtsman of the Statute of 1907 has evidently intended to distinguish between the setting aside of an indictment, as matter of law, and those criminal proceedings that have actually gone to a trial, and has sought to limit the conception of "jeopardy" to the latter.

But the case of the U. S. *v.* Sanges was also a demurrer to an indictment, like the case at bar.

Mr. Justice Gray, in his opinion, points out the course of decisions in the different States, and remarks that in some jurisdictions the right of review by the State is denied, on the ground, that it would put the defendant twice in jeopardy. Judge Gray, however, added:

"But the courts of many States, including some of great authority, have denied, *upon broader grounds*, the right of the State to bring a writ of error in any criminal case whatever, even when the discharge of the defendant was upon the decision of an issue of law by the court, as on demurrer to the indictment, motion to quash, special verdict, or motion for arrest of judgment" (p. 313).

The Court quoted with approval from the Supreme Court of Georgia that

"The common law maxim and the Constitution are founded in the humanity of the law, and in a jealous watchfulness over the rights of the citizen, when brought in unequal contest with the State" (p. 315).

It is therefore submitted that, notwithstanding the distinction attempted to be taken in the Act of March 2d, 1907, the constitutional safeguard to the defendant extends equally to the case of a decision upon a demurrer to the indictment as to a hearing and trial of the facts by a jury.

Repeated hearings by writs of error may prove as harassing to a citizen, as if taken after verdicts.

Such an innovation in the established criminal procedure of the United States deserves to be closely scrutinized; otherwise a constitutional safeguard may be gradually undermined, leaving a poor defendant to be run down by the powerful and persistent action of the Government.

II.—THE DEMURRER AND INDICTMENT WERE PROPERLY SUSTAINED BY REASON THAT THE ACT OF MARCH 2D, 1903, IN SO FAR AS IT RELATES TO PERSONS ARRIVING BY VESSEL, DOES NOT APPLY TO SEAMEN, OR STOWAWAYS, ENTERED ON THE SHIP'S ARTICLES.

In the case of Taylor, petitioner, against the United States, to be argued along with the case at bar, counsel for the petitioner have fully and adequately discussed in their brief, the provisions of the Act of March 2, 1903, together with the prior legislation of which the act is a compilation, and also the history attending the passage of the Act.

The context of the Act itself makes it clear that its general scope and purpose was to regulate the admission of passengers, and nearly all of its provisions are obviously intended to relate only to such aliens. If, by the use of the word "alien" it intended also to include seamen and stowaways it neglected to make suitable regulations with respect to such aliens also.

The reason why the word "alien" was used without limitation is not a matter of speculation. The proceedings in Congress disclose for what reason the word "immigration" was dropped. It was feared that it would limit the application of the Act to such aliens as came to this country *to settle*. The avowed object of the omission of the word "immigration" was to include aliens coming to this country, not to settle, but to stay for a time, and then return (36 Congressional Record, part I, p. 135).

If this statute were intended to apply to seamen, special regulations, differing from anything contained in the Act, were obviously required. The fact that the Act shows no reference to the subject, indicates that they were not intended to be included under the general term "alien."

It would seem to be a reasonable and proper interpretation of the Act that the word "alien" as used therein is intended to apply only to persons such as the procedure of the Act can be reasonably applied to. In the instance of aliens arriving by vessel, it would seem plain from the procedure prescribed by Sections 9 to 16 that only alien passengers are intended. The decision in the case of Holy Trinity *vs.* U. S., 143 U. S., 457, shows that the word "alien" cannot be interpreted in its unrestricted sense.

In like manner where it was contended by the Government that the purchase of a foreign built pleasure yacht brought into our waters was an "importation" that subjected the vessel to the payment of a tariff duty, this Court ruled the contrary, because the tariff provisions were not expressly applicable, also since the ownership fees and the documenting of vessels were already covered by special legislation.

The Conqueror, 166 U. S., 110.

Mr. Justice Brown reached the conclusion that:

"Congress seems to have recognized the theory, which we have already gathered from the prior course of legislation, that vessels should be treated as a class by themselves and not within the general scope of the tariff acts" (p. 121).

To the circumstance that the immigration law does not contain any suitable provisions regarding seamen must be added the fact that there were at the time and still are in existence, laws regulating this particular subject of seamen, which are apparently adequate. If they were not adequate in any particular, it is to be presumed that this legislation, which dealt with this particular subject of seamen, would have been the proper place for any additional measures required.

The subject of desertions by seamen is of interest and importance, not only to this country, but to the countries

under whose flags they are shipped. In the case of Great Britain, for instance, desertion is a punishable offence under the British law (Merchants' Shipping Act, 57, 58 Vict., Ch. 60, Sec. 221). It is an offence also under our own laws (R. S., Sec. 4596).

Unless there is some such control over seamen, ships are likely to be left stranded by desertion. The master cannot convert his vessel into a prison ship; the crew must be at large to perform their duties, and must have such reasonable shore leave as humane treatment demands.

It is in foreign ports, however, that desertions mostly occur. The laws of a foreign land cannot punish deserters, and they could leave without let or hindrance if there were no procedure by which they could be apprehended and returned to the country of their flag for punishment.

Comity demands, therefore, that we should assist a foreign country in securing the apprehension and return of a deserting seaman. This country has a right to ask the same favor at the hands of other countries. In pursuance of such comity we have a treaty with Great Britain (Treaty of June 3d, 1892) upon this subject. It provides, in substance, that each of the two countries shall have the assistance of the authorities of the other for the apprehension of deserters, and that a deserter from a British ship, not being an American citizen, shall be delivered up to the British Consul to be sent back to England (U. S. R. S., Sec. 5280).

Like treaties exist with other countries.

If the immigration law includes seamen, it is a breach of this arrangement with Great Britain, for the immigration law requires that an alien, not entitled to entry, shall be sent back to the country whence he came.

This, in the case of a British seaman, for instance, as is illustrated in the Taylor case, would at times re-

quire an alien to be sent to some country other than Great Britain, in violation of the terms of the treaty and statute referred to.

This would be a wholly unnecessary affront to a friendly power, because it does not make any difference to the United States to what country the alien is returned.

In United States *vs.* Sandrey (48 F. R., 550), referred to by the Circuit Judge in his opinion in the case at bar, the facts were the same as in this case. The alien had started as a stowaway from Liverpool, been signed on the articles at sea, and landed at New Orleans. Regarding his status, Judge Pardee says:

"Prior to his shipment he was a stowaway and destitute, and his purpose may have been to emigrate to the United States. But when he was enrolled as a seaman, and signed articles for a voyage from Liverpool to New Orleans and return to Liverpool, his status as a British seaman became fixed. He ceased for the time being at least to be a possible immigrant; and with regard to him the master of the steamship *Cuban*, the accused in this cause, was charged with no duties, nor exposed to any penalties, under the Act of Congress affirmed March 3, 1891. His desertion after the arrival of the ship at the port of New Orleans in nowise affects the duty or the responsibility of the accused. Murray's legal status, if he is now in this country, is not that of an immigrant, but that of a deserter from his ship" (p. 153).

This aptly describes the situation in the case at bar, and it would seem that the matter should be governed by the laws specially provided for such cases, and not by an immigration law which contains a chance phrase broad enough to cover seamen, but does not otherwise relate to the subject.

In Moffit *vs.* United States (128 F. R., 375) it was held that a peddler who was carried away from home by mistake did not come within Section 10 of the immigration law of 1891. The section was substantially the same as Section 19 of the Act of 1903. It employed the word

"alien" without any modification. The Court held that the meaning of the section must be determined from a consideration of the entire Act, and its history and purpose, that the section related only to an alien immigrant, and that a peddler carried off by mistake was not an immigrant.

In Cunard SS. Company *vs.* Stranahan (134 F. R., 318), it was sought to impose a fine on the shipowner under Section 9 of the Act of 1903, with respect to certain stowaways. Judge Wallace, in sustaining a demurrer, held that the section is intended to apply only to a case where a diseased person is brought in by the vessel as a passenger, or voluntarily, and that the word "bring" is used in the sense of import.

III.—THE INDICTMENT WAS PROPERLY QUASHED HOWEVER ON OTHER GROUNDS THAN THE INAPPLICABILITY OF THE IMMIGRATION ACT.

The first count clearly is bad for duplicity. If it charges any offence at all, it charges offences both under Section 8 and Section 19. It alleges that the defendant has brought into and landed by vessel, an alien not lawfully entitled to be admitted into the United States. This is an attempt to allege an offence under Section 8.

It also charges that the alien had been duly deported at Norfolk to the country from whence he came, as the defendant well knew, but that nevertheless the defendant landed the alien at the port of New Orleans. This is an attempt to charge an offence under Section 19.

These sections impose different penalties.

The count does not, however, sufficiently charge an offence under either of these sections. To constitute a

charge under Section 8, it should appear that the alien was neither entitled to land nor duly admitted by an immigrant inspector. Even if the alien were not entitled to land, yet, if he had been admitted by an inspector, there would be no offence under the section. It does not appear from the allegations of the first count that the alien was not duly admitted at New Orleans, but only that he was not lawfully entitled to be.

If the count be treated as charging an offence under Section 19 its allegations are also insufficient for that purpose. It should charge that the defendant neglected to detain the alien on board, or refused and neglected to return him to the port from which he came. It is bad also as a charge under Section 19 for another reason. The language of the indictment is that the defendant, having signed the alien on the articles at sea, "did then and there" unlawfully permit him to land in the United States. If this shows any offence at all, it certainly does not show any offence committed within the jurisdiction of the Circuit Court for the Eastern District of Louisiana.

The second count is also bad for duplicity and because it does not contain sufficient allegations.

It charges that the defendant did not adopt due precautions to prevent the landing of the alien at a time or place other than that designated by the immigration officers of the United States. This is not made an offence by Section 18, and no punishment is prescribed for failure in that respect. The count also alleges that the defendant permitted the alien to land at the port of New Orleans and to come into the United States at a time and place other than that designated by the immigration officers aforesaid. This must be read with what precedes it, so that the allegation amounts to a charge that the alien was per-

mitted to land through the failure to exercise due precautions to prevent it. Section 8, however, cannot be properly construed to intend anything but a deliberate and intentional landing or permission to land.

The second count also charges that the said alien had never been listed or manifested as required by law. This is an offence under Section 15.

IV.—THE JUDGMENT OF THE CIRCUIT COURT SHOULD BE AFFIRMED.

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